88-1671
No.

Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
MICHAEL R. DREEBEN
Assistant to the Solicitor General
WILLIAM KANTER
JOHN S. KOPPEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY G. THORN
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
MARY-HELEN MAUTNER
Counsel for Appellate Litigation
EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

91pp

QUESTION PRESENTED

Whether the attorney's fee provisions of the Black Lung Benefits Act, as applied, violate the Due Process Clause of the Fifth Amendment by denying claimants access to counsel.

PARTIES TO THE PROCEEDING

Petitioner, intervenor below, is the United States Department of Labor. Respondent, the respondent below, is George R. Triplett. The Committee on Legal Ethics of the West Virginia State Bar, the petitioner below, is a respondent in this Court under Rule 19.6 of the Rules of this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	2
Reasons for granting the petition	11
Conclusion	24
Appendix A	1a
Appendix B	37a
Appendix C	42a
Appendix D	52a
Appendix E	53a

TABLE OF AUTHORITIES

Cases:

Banks v. *Chicago Grain Trimmer's Ass'n*, 390 U.S. 459 (1968)	14
Blanchard v. *Bergeron*, 109 S. Ct. 939 (1989)	16
Blodgett v. *Holden*, 275 U.S. 142 (1972)	12
Camp v. *Herzog*, 104 F. Supp. 134 (D.D.C. 1952)	22
Director, Office of Workmen's Compensation Programs v. *Hemingway Transport, Inc.*, 1 Ben. Rev. Bd. Serv. 73 (Ben. Rev. Bd. 1974)	3
Fisch, In re, 188 App. Div. 525, 177 N.Y.S. 338 (1919)	14
General Dynamics Corp. v. *Horrigan*, 848 F.2d 321 (1st Cir.), cert. denied, 109 S. Ct. 554 (1988)	3
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	8, 20
Hobbs v. *Director, Office of Workers' Compensation Programs*, 820 F.2d 1528 (9th Cir. 1987)	4, 16
Lassiter v. *Department of Social Services*, 452 U.S. 18 (1981)	19
Levins v. *Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984)	16
Lyng v. *Payne*, 476 U.S. 926 (1986)	20
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	7, 13, 20

Cases—Continued: Page

Pennsylvania v. *Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078 (1987) 15-16
Pittston Coal Group v. *Sebben*, 109 S. Ct. 414 (1988) 3
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 12
Schweiker v. *Wilson*, 450 U.S. 221 (1981) 18
Shoemaker, In re, 11 Black Lung Rep. 3-145 (ALJ 1988) 23
Student Public Interest Research Group v. *AT&T Bell Laboratories*, 842 F.2d 1436 (3d Cir. 1988) 16
Taylor v. *Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. 3-184 (ALJ 1988) 23
Thompson v. *Potashnick Construction Co.*, 812 F.2d 574 (9th Cir. 1987) 4, 16
United States v. *Carter*, 760 F.2d 266 (4th Cir. 1985) 22
Velasquez v. *Director, Office of Workers' Compensation Programs*, 844 F.2d 738 (10th Cir. 1988) 4, 16
Walters v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985) ..... *passim*
Wells v. *Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. 1-63 (Ben. Rev. Bd. 1986) ... 23
Yeiser v. *Dysart*, 267 U.S. 540 (1925) 15

Constitution, statutes, and regulations:

U.S. Const.:
Amend. I 21
Amend. V (Due Process Clause) 2, 20, 24
Act of Mar. 4, 1927, ch. 509, § 28, 44 Stat. 1438 13
Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 2
§ 401, 30 U.S.C. 901 .....
§ 422, 30 U.S.C. 932 ..... 53a
§ 422(a), 30 U.S.C. 932(a) (1982 & Supp. IV 1986) .. 2, 3, 4
Black Lung Benefits Act Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 18
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921 *et seq.*
§ 21(c), 33 U.S.C. 921(c) 4
§ 28, 33 U.S.C. 928 (1982 & Supp. IV 1986) 2, 3, 4, 13, 54a

Statutes and regulations—Continued: Page

§ 28(a), 33 U.S.C. 928(a) 4, 16, 54a
§ 28(c), 33 U.S.C. 928(c) 3, 5, 55a
§ 28(e), 33 U.S.C. 928(e) (1982 & Supp. IV 1986) ... 22, 56a
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Tit. IV, § 422, 83 Stat. 796 14
18 U.S.C. 1341 23
18 U.S.C. 1505 23
42 U.S.C. 1983 16
20 C.F.R.:
Section 725.351(a)(5) 22
Section 725.362 3
Sections 725.362-725.367 3
Section 725.363 3
Section 725.365 ..... 3, 5
Sections 725.365-725.367 ..... 2, 57a
Section 725.366 ..... 3, 57a
Section 725.366(a) 4
Section 725.366(b) 4
Section 725.367 ..... 59a
Section 725.367(a) 4
Section 725.401 4
Section 725.419 4
Section 725.481 4
Section 725.482 4
Section 802.202(e) 22
29 C.F.R. 18.34(g)(3) 22

Miscellaneous:

115 Cong. Rec. (1969):
p. 37,970 14
p. 39,709 14
pp. 39,712-39,713 14
p. 39,718 14
p. 39,996 14
p. 39,999 14
127 Cong. Rec. 31,979 (1981) 18
53 Fed. Reg. 16,519 (1988) 22
J. Stein, G. Mitchell & B. Mezines, *Administrative Law* (1987) 22

Miscellaneous—Continued:	Page
H.R. 9498, 69th Cong., 1st Sess. (1926)	
H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. (1969) ...	14
H.R. Rep. No. 1441, 92d Cong., 1st Sess. (1972)	14
Hearing on H.R. 9498 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess. (1926)	13
Hearnigs on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary, 69th Cong., 1st Sess. (1926) ..	13
House Comm. on Education and Labor, 96th Cong., 1st Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979)	23
Investigation of the Backlog in Black Lung Cases: Hearings before the Subcomm. on Labor Relations of the House Comm. on Education and Labor, 99th Cong. 1st Sess. (1985)	6, 18
Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 100th Cong., 2d Sess. (1988)	18
Report to the Honorable Donald J. Pease, House of Representatives by the U.S. General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board (Oct. 26, 1984)	18
S. 3170, 69th Cong., 1st Sess. (1926)	14
U.S. Department of Labor, Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* (1983)	15

In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The Acting Solicitor General, on behalf of the United States Department of Labor, petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals (App., *infra,* 1a-32a), is reported at 376 S.E. 2d 818. A dissenting opinion (App., *infra,* 33a-36a) and an opinion on rehearing (App., *infra,* 37a-41a) are unreported. The Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline of the Committee on Legal Ethics of the West Virginia State Bar (App., *infra,* 42a-51a), are unreported.

JURISDICTION

The judgment of the Supreme Court of Appeals was entered October 26, 1988. A petition for rehearing was denied on December 21, 1988 (App., *infra,* 52a). On March 14, 1989, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and

including April 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) (1982 & Supp. IV 1986), incorporating various provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), and Section 28 of the LHWCA (33 U.S.C. 928 (1982 & Supp. IV 1986)), which is one of the provisions so incorporated, are set forth in an appendix (App., *infra,* 53a-56a).

The Department of Labor's regulations governing the payment of claimants' attorney's fees in black lung cases, 20 C.F.R. 725.365-725.367, are set forth in an appendix (App., *infra,* 57a-60a).

STATEMENT

In this case the Supreme Court of Appeals of West Virginia determined that the system for awarding attorney's fees in black lung cases violates the Due Process Clause of the Fifth Amendment, by denying claimants access to counsel. The court concluded that the attorney's fee system produces undue delays in payment and provides inadequate compensation, thereby discouraging most attorneys in West Virginia from representing claimants for black lung benefits. The court thus held that, as applied, the attorney's fee provisions are unconstitutional, and, consequently, the violation of those provisions cannot serve as the basis for attorney disciplinary proceedings.

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (1982 & Supp. IV 1986), "provides benefits to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment," and to their eligible survivors.

Pittston Coal Group v. *Sebben*, 109 S. Ct. 414, 417 (1988). A claimant for benefits may be represented "in any proceeding for determination of a claim" by a qualified representative, including an attorney. 20 C.F.R. 725.362, 725.363. As part of its protection for eligible beneficiaries, the Act regulates the payment of fees for a claimant's attorney. See 30 U.S.C. 932(a) (1982 & Supp. IV 1986) (incorporating, *inter alia,* 33 U.S.C. 928 (1982 & Supp. IV 1986)). The Department of Labor has also issued comprehensive regulations governing the award of such fees. 20 C.F.R. 725.362-725.367.

Under the Act and the Department of Labor's regulations, an attorney for a black lung claimant is prohibited from charging a fee unless the fee has been approved by the appropriate agency or court. 33 U.S.C. 928(c); 20 C.F.R. 725.365. The regulations also provide that "[n]o contract or prior agreement for a fee shall be valid." 20 C.F.R. 725.365. When the claimant does not prevail in his effort to win benefits, no fee is approved. See *General Dynamics Corp.* v. *Horrigan,* 848 F.2d 321 (1st Cir.), cert. denied, 109 S. Ct. 554 (1988); *Director, Office of Workmen's Compensation Programs* v. *Hemingway Transport Inc.*, 1 Ben Rev. Bd. Serv. 73 (Ben. Rev. Bd. 1974). When the claimant does prevail in a contested case, the coal mine operator, its insurance carrier, or, in certain instances, the Black Lung Disability Trust Fund (administered by the Director of the Office of Workers' Compensation Programs in the Department of Labor) pays "a reasonable attorney's fee." 30 U.S.C. 932(a) (1982 & Supp. IV 1986) (incorporating 33 U.S.C. 928(a)); 20 C.F.R. 725.367.

The black lung regulations establish the procedures for applying for a fee and the criteria for its award. See 20 C.F.R. 725.366. The application must itemize the work done and note "the customary billing rate" of the person who performed it. *Ibid.* An approved fee "shall be reason-

ably commensurate with the necessary work done." 20 C.F.R. 725.366(b). The regulation identifies as factors to be taken into account in setting a fee "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." *Ibid.*

An attorney must apply separately to the "deputy commissioner, administrative law judge, or appropriate appellate tribunal" before whom the services were performed. 20 C.F.R. 725.366(a). A claim begins with processing by a Department of Labor deputy commissioner. 20 C.F.R. 725.401. Any party can then request a de novo hearing before an administrative law judge (ALJ). 20 C.F.R. 725.419. The ALJ's decision is subject to review by the Benefits Review Board, and review of that decision is available in a court of appeals. 30 U.S.C. 932(a) (1982 & Supp. IV 1986) incorporating, *inter alia*, 33 U.S.C. 921(c); 20 C.F.R. 725.481, 725.482. An award of attorney's fees is not enforceable until the claimant receives a final award of benefits (33 U.S.C. 928(a)). An approved fee at that point "shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final." 20 C.F.R. 725.367(a). The fees ultimately paid do not include interest. See *Hobbs* v. *Director, Office of Workers' Compensation Programs,* 820 F.2d 1528, 1530-1531 (9th Cir. 1987). Nevertheless, the attorney's risk of loss and the delay in payment can be reflected in the hourly rate charged by claimant's attorney. See *Velasquez* v. *Director, Office of Workers' Compensation Programs,* 844 F.2d 738, 739 (10th Cir. 1988); *Hobbs,* 820 F.2d at 1529; *Thompson* v. *Potashnick Construction Co.*, 812 F.2d 574, 577 (9th Cir. 1987).

2. a. Beginning in 1978, respondent, a West Virginia lawyer, entered into contingent fee agreements with approximately fifteen black lung claimants (see App., *infra,* 2a, 46a-48a). These agreements entitled him to 25% of the back benefits recovered by the claimants as a result of his representation. *Ibid.* Between 1978 and 1983, claimants represented by respondent were awarded benefits, and he collected fees under the contingent fee arrangements. Since these fees were never approved by the appropriate agency or court, they were collected in violation of the statute and Department of Labor regulations. *Id.* at 47a-49a; see 33 U.S.C. 928(c), 20 C.F.R. 725.365.

In 1987, the Committee on Legal Ethics of the West Virginia State Bar began a disciplinary proceeding against respondent based on his violations of the Department's fee regulations. Following a hearing, the Committee found respondent to have engaged in professional misconduct. App., *infra,* 42a-44a. The misconduct consisted of "[h]is failure to abide by the [Department] regulation," a failure that constituted among other things, "conduct that is prejudicial to the administration of justice" and that "adversely reflects on his fitness to practice law". *Id.* at 50a (citing West Virginia Code of Professional Responsibility, DR 1-102(A)(4), (5), and (6) (1982)). The Committee filed a complaint in the Supreme Court of Appeals of West Virginia to enforce a recommended six-month suspension. App., *infra,* 1a.

b. The Supreme Court of Appeals denied enforcement of the suspension. App., *infra,* 1a-32a. The court held that the provisions for awarding attorney's fees under the black lung statute and the Department's regulations, as applied, "severely restrict [black lung] claimants' ability to find competent lawyers to represent them, and therefore the system violates due process." *Id.* at 24a. The court concluded that because the attorney's fee limitations were unconstitutional, respondent's failure to comply with the

Department's regulations did not violate West Virginia ethical rules.[1] *Id.* at 30a.

The court acknowledged that the Department's regulations "appear[] to provide for attorneys' fees that will fairly compensate competent counsel," but it nevertheless found that "the factual record before us reveals that this is not the case." App., *infra,* 16a. This "factual record" consisted solely of the affidavits of five attorneys submitted to the court as attachments to an amicus brief and of attorney testimony before a House of Representatives Subcommittee in 1985. *Id.* at 17a-20a (citing *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. (1985)). Based on that record, the court determined that the fee provisions manifested two inadequacies that deter "most" attorneys from taking on black lung cases. Those problems were "the long delay in payment, without any provision for interest, and the lack of premiums to offset the contingent nature of the work." App., *Infra*, 20a. The court added that "[t]his latter factor has become increasingly prominent as the approval rate [for claimants] has steadily declined" as a result of tighter eligibility criteria under 1981 amendments to the black lung statute. *Ibid.* The court cited an approval rate of 22.7% for claimants before an ALJ and 5.8% overall under the 1981 amendments. *Ibid.* The low approval rate, the court believed, established "not only the necessity of lawyer representation, but [also] the substantial risk that a lawyer will receive no fee at all for his work." *Ibid.*

[1] The court rejected the Committee's charge in its complaint that Triplett had misrepresented his fee arrangements to the Department, finding that the Committee had not adequately alleged such a violation and that the evidence did not support it in any event. App., *infra,* 5a-6a.

The court then evaluated the attorney's fee system under the three-factor test articulated by this Court in *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), and *Walters* v. *National Association of Radiation Survivors,* 473 U.S. 305 (1985). App., *infra,* 20a-24a. Under this test, the court noted, it must weigh "the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest in adhering to the existing system." *Id.* at 8a (quoting *Walters,* 473 U.S. at 321). Applying those factors, this Court in *Walters* had upheld Congress's $10 fee limitation for attorneys in Veterans' Administration (VA) benefits proceedings, finding no due process violation. The court here applied the same factors to reach the opposite result.

First, the court identified two government interests in the regulation of fees in the black lung program: (1) the fee approval requirement serves "to ensure that neither the responsible operator nor the Trust Fund will be overcharged," and (2) the prohibition of private fee agreements serves "to protect claimants from improvident agreements that needlessly deplete their benefits." App., *infra,* 21a. The court discounted these interests, however, because of its view that the fee system in operation has made lawyers "almost entirely unavailable to claimants," with the result that "under the current system the claimant seldom has an award to share." *Ibid.*

Turning to the second factor, the court surmised that the absence of counsel poses a serious risk of an erroneous result. While acknowledging that it lacked statistics comparing the success rates of black lung claimants with and without counsel, the court asserted that the "black lung claims process is procedurally, factually and legally complex," and that "lawyer representation is virtually essential

to prevent erroneous deprivations of benefits for victims of black lung." App., *infra,* 22a-23a. The court found support for its determination in the experiences of respondent's clients, who, the court stated, had failed to win benefits without counsel but had succeeded in winning benefits with counsel. *Id.* at 22a. The court speculated that respondent's "clients can probably be taken as representative of most claimants." *Ibid.* The court added that the advantage of having an attorney in a black lung case distinguished this case from *Walters,* where veterans represented by counsel were only "marginally more successful" than those who proceeded without lawyers. *Id.* at 21a-22a. The court also observed that, in contrast to the network of veterans' groups in *Walters,* nonlawyer representatives are not widely available for black lung claimants. *Id.* at 23a.

Finally, the court evaluated the weight of the private interests at stake. In *Walters,* this Court had emphasized that VA benefits are awarded on the basis of disability rather than need, which reduced their weight in the analysis of the process that was due. 473 U.S. at 333. Although black lung benefits are also awarded on the basis of disability, not need, the court here insisted that the interest in obtaining black lung benefits deserved a weight comparable to the strong interest in retaining subsistence welfare benefits that was recognized in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). App., *infra,* 23a-24a. The court explained that since black lung benefits are awarded for total disability or death, they "may well provide the only means of subsistence" to claimants. *Id.* at 24a.

Summarily balancing these factors, the court concluded that "the system as currently administered denies claimants for black lung benefits property without due process of law by severely restricting their right to obtain epresentation by competent counsel." App., *infra,* 28a; *id.* at 24a. Without citing any specific provision of the Constitution, the court also discovered an "independent" constitutional ground for invalidating the fee system: it effectively denies "qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits granted by Congress." *Id.* at 24a-25a.[2]

Two justices dissented. App., *infra,* 33a-36a. The dissenting opinion noted that the majority had decided a constitutional question never raised below, and, as a consequence, "there is no factual record developed." *Id.* at 33a. In particular, the dissent stated that "[t]he ex parte affidavits" of attorneys practicing in the black lung field were "woefully inadequate" to sustain the finding that the black lung fee system deprived claimants of access to counsel. *Ibid.*

The dissent also found the majority's reliance on *Walters* to be "completely misplaced." App., *infra,* 33a. The dissent took issue with the majority's failure to give the appropriate deference to the " 'duly enacted and carefully considered decision' " of Congress (*id.* at 34a (quoting *Walters,* 473 U.S. at 319)), and recalled that this Court in *Walters* had stressed that " '[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law.' " App., *infra,* 34a-35a (quoting *Walters,* 473 U.S. at 326). Applying that standard, the dissent was convinced that no such " 'extraordinarily strong showing' has been made based on the generalized ex parte affidavits filed with this Court." App., *infra,* 35a (footnote omitted).

---

[2] While not purporting to direct the Labor Department to adopt any particular fee regulations, the court suggested that the Department "could provide for a contingent fee," or could use a "multiplier * * * to enhance the 'normal' hourly fee to compensate for the risk of loss." App., *infra,* 25a.

3. Recognizing that its decision "involves an important question of federal law," the majority invited the Department of Labor to intervene as a party. App., *infra,* 30a. In response, the Department of Labor did intervene, to supplement the record and to petition for rehearing, but the petition for rehearing was denied (App., *infra,* 37a-41a). In a brief opinion, the court rejected or ignored the Department's arguments that the fee system advances important government interests and does not unduly hinder black lung claimants in obtaining counsel. In particular, the court ignored the argument that Congress specifically intended, in regulating fees, to shield claimants from improvident fee agreements and to prevent dissipation of their benefits through payments to attorneys. The court also ascribed no significance to the Department's argument that, especially in view of the Trust Fund's $3 billion debt to the government, the fee system serves an important governmental interest in avoiding overpayment. The court viewed this to be an argument that the current system of fees is justified as a way to keep down the number of successful claimants. *Id.* at 39a-40a.

As to the factual record, the Department presented statistics with its rehearing petition regarding the outcome of recent black lung cases before administrative law judges. App., *infra,* 40a. The statistics indicated that in 92% of cases resulting in an award or denial of benefits, the claimants had attorneys, and prevailed 29% of the time; in the remaining 8% of cases, the claimants proceeded pro se, and prevailed 11.6% of the time. *Ibid.* Without commenting on the overwhelming rate of representation at the ALJ level shown by these figures, the court read the statistics to mean only that claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se.*" *Ibid.* Thus, the court concluded, the Department "has simply reinforced

with more elaborate statistics the conclusion that we reached in the original opinion—namely, that a claimant's chance of prevailing when he is represented by counsel is substantially higher than when he appears *pro se.*" *Ibid.*

REASONS FOR GRANTING THE PETITION

The court below has declared unconstitutional the federal black lung attorney's fee system, as applied, in one of the nation's principal coal-mining states. That holding cannot be reconciled with the decisions of this Court addressing due process challenges to administrative procedures, and, in particular, is wholly at odds with the reasoning and result in *Walters* v. *National Association of Radiation Survivors, supra.* In *Walters,* this Court sustained against a due process challenge Congress's decision to limit to $10 the attorney's fee available in VA proceedings. Contrary to *Walters,* the court below failed to pay any deference to the congressional policy in favor of fee regulation, and relied on a factual showing far too meager to justify a sweeping conclusion that an Act of Congress is being unconstitutionally applied.

The decision below has important, and detrimental, practical ramifications. The black lung benefits program handles thousands of claims each year. The decision below substantially deprives black lung claimants in West Virginia of the protection against overreaching and against unjustified diminution of their benefits that Congress mandated in regulating attorney's fees. Although the decision does not preclude the Department's own enforcement of the attorney's fee limitations, it does remove the primary method on which the Department relies to enforce the fee provisions in West Virginia—state bar disciplinary proceedings. If not reversed by this Court, the decision may also encourage attorneys in other coal-mining States

to flout the black lung fee requirements. Because the decision below is wrong, and because it undermines the protection for black lung claimants envisioned by Congress, review by this Court is warranted.

1. The court's holding that the black lung fee system is unconstitutional cannot be squared with this Court's decisions regarding the regulation of attorney's fees. From the outset, the court below starkly misconceived its proper role by failing to pay the necessary deference owed to an Act of Congress. This Court has admonished that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that [the judiciary] is called upon to perform, and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters,* 473 U.S. at 319 (citations and internal quotation marks omitted); *Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981); *Blodgett* v. *Holden,* 275 U.S. 142, 148 (1927) (Holmes, J.). The court below failed to heed that guiding principle. Instead, it insisted on drawing broad and unsound conclusions from a record far too sparse to serve as the basis for overturning an Act of Congress as administered by a federal agency.

In finding the black lung attorney's fee system to be unconstitutional, the court purported to follow this Court's established framework for assessing due process challenges. In executing that task, however, the lower court misapplied all three factors to which this Court has directed inquiry: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or alternative procedural safeguards, and (3) the government's interest in adhering to the present system, including the fiscal and administrative burdens the

additional requirements would entail. *Walters,* 473 U.S. at 321; *Mathews,* 424 U.S. at 335.

a. The court significantly undervalued the government interests served by the black lung attorney's fee limits. Congress's purpose in regulating black lung attorney's fees is to protect claimants from improvident agreements that needlessly deplete their benefits. The regulation of attorney's fees in the black lung program results from Congress's incorporation of Section 28 of the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 928) into the Black Lung Benefits Act. The LHWCA has protected claimants against imprudent fee arrangements since its enactment in 1927. Act of Mar. 4, 1927, ch. 509, § 28, 44 Stat. 1438. The same reasons that prompted the regulation of attorney's fees in the LHWCA context are equally applicable here.

Section 28 of the LHWCA, as originally enacted, provided that no one may charge a claimant a fee unless approved by the appropriate court or administrative officer. *Ibid.* This provision was specifically designed to protect a class of unsophisticated workers who had been subjected to "sharp practices" of people who represented them. See *Hearing on H.R. 9498 Before the House Comm. on the Judiciary,* 69th Cong., 1st Sess. 40 (1926) (statement of Harry S. Austin, attorney for the International Longshoremen's Association) (*1926 House Hearings*); *Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary,* 69th Cong., 1st Sess. 68-69 (1926) (statement of O.G. Brown, Council of American Shipbuilders and the New York and New Jersey Dry Dock Association) (*1926 Senate Hearings*).[3] The provision was modeled on

[3] Both the Senate and the House considered bills requiring approval of claims for "legal services" for claimants' representatives. See H.R. 9498, 69th Cong., 1st Sess. § 38 (1926), *reprinted in* the *1926 House*

an early New York worker's compensation law, see *Banks* v. *Chicago Grain Trimmer's Ass'n,* 390 U.S. 459, 466 (1968), that was intended to "insure as large a return to the injured workman in compensation for injuries incurred in the course of his employment as possible." *In re Fisch,* 188 App. Div. 525, 177 N.Y.S. 338, 341 (1919).

The Black Lung Benefits Act has included the LHWCA fee provision since its enactment in 1969. See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Tit. IV, § 422, 83 Stat. 796.[4] As with LHWCA claimants,

---

Hearings, supra, at 11; S. 3170, 69th Cong., 1st Sess. § 38 (1926), *reprinted in 1926 Senate Hearings, supra,* at 11. The attorney for the International Longshoremen's Association proposed a criminal sanction, modeled on New York's worker's compensation law, to strengthen the fee provision. *1926 House Hearings, supra,* at 40. The attorney for the Council of American Shipbuilders and the New York and New Jersey Dry Dock Association pointed out that limiting approval requirements to "legal services" allowed non-lawyers to exploit injured workers and suggested that only lawyers be allowed to represent claimants. *1926 Senate Hearings, supra,* at 68-69. The Senate later passed a bill incorporating a criminal sanction and requiring approval of claims for legal services "or for any other services rendered in respect of a claim," *1926 House Hearings, supra,* at 129; the full provision of that bill was enacted without change in 1927. In 1972, when Congress added a fee shifting provision to Section 28, it reaffirmed the principle that "no fee may be received unless approved" by the appropriate court or administrative official. H.R. Rep. No. 1441, 92d Cong., 2d Sess. 21 (1972).

[4] The fee provisions, and other portions of the Longshore statute, were added to Part C of the black lung statute in conference. See H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 89-91 (1969). During debate on the conference report, supporters of the legislation uniformly stated their intent to incorporate into Part C the enumerated Longshore provisions. See 115 Cong. Rec. 39,707, 39,709 (Rep. Perkins), 39,712-39,713 (Rep. Dent); 39,718 (Rep. Burton); 39,996 (section-by-section analysis of the Conference Report, presented by Sen. Williams); 39,999 (Sen. Javits).

black lung claimants are susceptible to exploitation because they typically have limited education. See U.S. Department of Labor, Employment Standards Admin., *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983) (while some widows have more education, three-fourths of miners did not attend high school). "[R]ational paternalism" in restricting fees is a proper legislative purpose (*Walters,* 473 U.S. at 323), especially when, as in this instance, the claimant population is susceptible to exploitation that might deprive them of their full share of benefits.

This Court long ago recognized the legitimacy of protecting claimants "against improvident contracts, in the interest not only of themselves and their families, but of the public." *Yeiser* v. *Dysart,* 267 U.S. 540, 541 (1925) (upholding provision in Nebraska worker's compensation statute requiring approval of fees charged a claimant). The court below gave that congressional policy short shrift because of its view that "under the current system the claimant seldom has an award to share." See App., *infra,* 21a. Like the district court in *Walters* (473 U.S. at 323), the West Virginia court erred by "cavalierly dismissing" Congress's long-asserted purpose.

The court also erred by ignoring the impairment of other government interests that would flow from its preferred fee system. The court suggested that the Department could adopt a statewide "multiplier" to compensate claimant's attorneys for their risk of loss. App., *infra,* 25a. But that approach would drive up costs to operators and, more particularly, to the Black Lung Disability Trust Fund, which is already some $3 billion in debt to the federal treasury. See *Id.* at 39a.

Moreover, it is unclear what kind of a multiplier would be permissible in view of this Court's opinion in *Pennsyl-*

vania v. *Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078 (1987), where four Members opposed any risk of loss enhancement in fee-shifting arrangements (*id.* at 3087) and a fifth Member found an enhancement permissible only when limited to the range necessary to attract competent counsel in the local market (*id.* at 3090-3091 (O'Connor, J., concurring)). Judging from the experience of lower courts, see, *e.g.*, *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 842 F.2d 1436, 1451-1452 (3d Cir. 1988), the court's proposed multiplier would likely lead to expensive and counterproductive litigation over fees. See also *Levins* v. *Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984) (employers have due process rights to hearings to contest attorney's fees). Likewise, the court's proposal (App., *infra*, 25a) to allow contingent fees would defeat Congress's purpose of preserving as much as possible of the pool of benefits for the claimant. Those problems underscore the government's interest in adhering to the present system, which fairly compensates claimants' attorneys without the complications caused by the alternatives proposed by the court.[5]

b. Given the weight of these government interests, as the dissent here recognized, "[i]t would take an extraordinarily strong showing of probability of error under the

[5] As discussed above (at 4), the hourly component of the fee award can *now* take into account the delay in payment, as well as the risk of loss borne by the attorney. See *Velasquez*, 844 F.2d at 739; *Hobbs*, 820 F.2d at 1529; *Potashnick Construction Co.*, 812 F.2d at 577. These provisions for delay and risk of loss satisfy the statutory requirement that a prevailing attorney obtain a "reasonable fee" (33 U.S.C. 928(a)). Indeed, for meritorious claims, existing procedures could result in a greater attorney's fee for the claimant's lawyer than would be available under a contingent fee arrangement. Cf. *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989) (reasonable attorney's fee under 42 U.S.C. 1983 not limited to contingent fee agreement).

present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." App., *infra*, 34a-35a (quoting *Walters*, 473 U.S. at 326). There plainly was no such showing here.

To begin, the court's pivotal conclusion—that the fee system had produced a shortage of lawyers—lacks any adequate foundation in the record. The court relied solely on a few attorney affidavits, together with excerpts from congressional testimony expressing a general unhappiness with the fee system and a belief that there was a consequent shortage of attorneys. App., *infra*, 16a-20a. That sort of impressionistic evidence is not sufficient to sustain a finding of unconstitutionality for an administrative program receiving 7,000 or 8,000 new claims a year—as the Department of Labor says is the case with the Black Lung Program—particularly when the Department presented statistics showing a 92% rate of representation at the ALJ level. This Court has made clear its rejection of such "anecdotal evidence" to sustain across-the-board findings about the operation of vast federal programs. See, *e.g.*, *Walters*, 473 U.S. at 324 n.11. The court here failed even to acknowledge the Department's evidence of the high rate of representation of black lung claimants at the ALJ level, thereby overlooking its obligation to consider "the risk of error inherent in the truth-finding process as applied to the *generality* of cases." *Walters*, 473 U.S. at 321 (emphasis added).

Moreover, even assuming that substantial numbers of attorneys are generally unavailable, the court never adequately explained how the present fee system bears responsibility for the attorney shortage. The 5% initial approval rate of claims under the 1981 amendments to the black lung statute may well be a significant factor discouraging attorney representation (App., *infra*, 14a n.15, 20a. This low rate derives naturally from Congress's deci-

sion to tighten black lung eligibility standards in 1981.[6] See Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 (1981); 127 Cong. Rec. 31,979 (1981) (statement of co-sponsor Sen. Nickles contemplating a 4% approval rate under the 1981 amendments). Reduced attorney interest can reasonably be expected in a litigation area with limited chances of success, but that result cannot rationally be attributed to the fee system.

Similarly, the court erroneously seized on the delay in black lung adjudications and in the payment of fees as a key reason for the unavailability of claimants' attorneys (App., *infra,* 20a). Delays also exist for claims adjudicated under earlier versions of the law that are more favorable to claimants—and attorneys are widely available to handle such claims. See *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. 103 (1985) (statement of Gerald F. Sharp, counsel for District 28, UMW). Delay in payment, therefore, is not the determinative factor in any attorney shortage that may exist.[7]

---

[6] Of course, Congress's choice to tighten eligibility standards raises no due process question. See *Schweiker* v. *Wilson,* 450 U.S. 221, 238 (1981).

[7] Congress and the Department of Labor are aware of the delay resulting from the 1978 amendments to the black lung statute, which required the reopening of about 200,000 claims. See *Report to the Honorable Donald J. Pease, House of Representatives, by the U.S. General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* App. I 7 (Oct. 26, 1984). The Department has made substantial progress in eliminating the backlog at the ALJ level, though delays still exist at the Benefits Review Board. See *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Eaucation and Labor,* 100th Cong., 2d Sess. 67 (1988) (statement of Rep. Wise).

The court also marshalled no persuasive evidence to show that in the "generality of cases" (*Walters,* 473 U.S. at 330), attorneys materially improve the results for black lung claimants. In its initial opinion, the court relied exclusively on the experiences of the handful of claimants represented by respondent. The court found it significant that after retaining respondent as their lawyer, those claimants had obtained benefits that had been previously denied. App., *infra,* 22a. But even if the improved results in those few cases were attributable to respondent's efforts, there was no basis for the court's speculation that these claimants "can probably be taken as representative of most claimants." *Ibid.*

Moreover, in its opinion on rehearing, the court seriously misconstrued the Department's statistics as showing that lawyers necessarily produce a better outcome for claimants. *Id.* at 40a (characterizing the statistics as "conclusively demonstrat[ing] that at the [ALJ] level, claimants represented by counsel have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*"). The Department's figures do not support any inference that attorneys were the reason for the difference in outcome noted by the court. Most critically, almost all (92%) of the claimants *were* represented by counsel and only a small percentage of the claimants proceeded pro se. That fact significantly undercuts the use of comparative success rates as a ground for concluding that pro se claimants win less frequently *because* they lack lawyers. An equally likely explanation of the results is that the pro se claimants simply failed to attract lawyers because their cases were not strong enough. Compare *Lassiter* v. *Department of Social Services,* 452 U.S. 18, 29 n.5 (1981) (similar statistics were "unilluminating"). Even if the fee system discourages representation in such marginal cases, it remains true that "a process which is sufficient for the large majority of a

group of claims is by constitutional definition sufficient for all of them." *Walters,* 473 U.S. at 330.

c. Finally, by giving too much weight to the private interest affected, the court erred in its analysis of the third factor in the *Mathews* test. In both *Walters* and *Mathews,* this Court stressed that the disability benefits involved were not based on need, nor did they constitute a recipient's sole means of livelihood. The same is true here. The court's efforts to categorize black lung benefits as similar to the subsistence welfare benefits in *Goldberg* v. *Kelly* ignores this Court's previous assessment of the relative weight of disability benefits for due process purposes. As the Court explained in *Mathews* (424 U.S. at 340), the unusually heavy weight given the private interest in *Goldberg* came from the unique nature of welfare as "assistance * * * given to persons on the very margin of subsistence * * *." Terminating aid " 'may deprive an *eligible* recipient of the very means by which to live while he waits.' " *Ibid.* (quoting *Goldberg*). This factor is " 'not present in the case of * * * virtually anyone else whose governmental entitlements are ended.' " *Ibid.* (quoting *Goldberg*; ellipsis in *Mathews*). Here, as in *Mathews,* the disability benefits sought are but one form of government aid that claimants may seek. *Id.* at 342. Thus, the court below erred in placing black lung benefits on the same plane as the welfare payments in *Goldberg.*[8]

[8] Additionally, the court appeared to believe (App., *infra,* 23a) that applicants for benefits, who have not yet been found eligible, have as strong a "property" interest in benefits as current recipients, who have been found eligible for benefits under an entitlement program. This Court has never held that applicants have any property interest at all under the Fifth Amendment, much less that an applicant's interest is equal to a recipient's. See *Lyng* v. *Payne,* 476 U.S. 926, 942 (1986).

In sum, the lower court erred by ignoring or trivializing important government interests, overemphasizing claimants' interests, and failing adequately to assess the effect of the fee system on the availability of claimants' attorneys. The court's determination that the black lung fee system violates the due process rights of claimants rests on an entirely inadequate factual record, and should be reversed.[9]

2. The court's declaration that the black lung fee system is unconstitutional allows West Virginia attorneys to enter into fee arrangements with black lung claimants without the risk of state bar disciplinary sanctions. Attorneys may thus charge claimants contingent fees, contrary to the Department's regulations and to the intent of Congress that a claimant's contested award be preserved intact for the claimant. Also contrary to the statute, attorneys may charge fees to claimants who will never even receive benefits.

West Virginia is an important state for such a gap in protection to emerge. The Department of Labor informs us that, in fiscal year 1987, approximately 18% of the 8,292 black lung filings arose in West Virginia, and it estimates that a comparable percentage of the approximately 7,000 benefit filings in fiscal year 1988 were in that State. The court's decision therefore affects attorneys who handle almost one-fifth of the claims filed in the black lung program.

[9] The alternative theory advanced by the court—that it was unconstitutional for the Department to administer a process that denied claimants access to benefits that Congress has provided—simply restates the due process claim in a different guise and therefore has no "independent significance." *Walters,* 473 U.S. at 335 (rejecting claim that the $10 fee limitation violated the First Amendment because that claim is "at base, * * * inseparable from the[] due process claim").

Removing the state bar's disciplinary proceedings as a sanction will significantly damage the Department of Labor's ability to protect claimants from inappropriate and unlawful fees. The Department advises us that it relies on such proceedings as the primary means of enforcing the black lung fee requirements. Existing regulations are unlikely to fill the void left by the court's holding here. As a practical matter, the Department's multi-level, case-by-case system of adjudication is simply not equipped to undertake an investigation into conduct that typically involves multiple claimants and comes to light after claims have been finally adjudicated.[10] Moreover, criminal prosecution is not an effective tool to deal with unlawful fee arrangements. Indeed, while the LHWCA authorizes fines or imprisonment for unauthorized fee activities (33 U.S.C. 928(e)), that provision has been held not to be incorporated into the black lung statute. *United States* v. *Carter*, 760 F.2d 266 (4th Cir. 1985) (per curiam).[11]

[10] As discussed above (at 4), black lung claims and fee petitions are processed first by deputy commissioners in the Office of Workers' Compensation Programs (OWCP) and may then go to ALJs and the Benefits Review Board. Deputy commissioners have general authority to issue "appropriate orders" (20 C.F.R. 725.351(a)(5)), but such a provision may not be specific enough to allow discipline. See *Camp* v. *Herzog*, 104 F. Supp. 134, 137-138 (D.D.C. 1952); J. Stein, G. Mitchell & B. Mezines, *Administrative Law* § 42.02[1], at 42-17 (1987). While an ALJ has authority to exclude an attorney from the proceeding because of unethical or improper conduct (29 C.F.R. 18.34(g)(3)), the provision has not been tested as a general means of enforcing the fee requirements. The Benefits Review Board may exclude attorneys whose conduct merits a suspension or loss of license (see 53 Fed. Reg. 16,519 (1988), adding 20 C.F.R. 802.202(e)), but this provision cannot be used against West Virginia lawyers in light of the Supreme Court of Appeals' decision here that violations of the Department's regulations are not unethical.

[11] It is also generally difficult to prove that entering into a fee agreement satisfies the elements, for example, of mail fraud or obstruction of justice (see 18 U.S.C. 1341, 1505; cf. RXs 16, 17; App., *infra*, 5a-6a (court's finding that respondent's conduct did not involve misrepresentation)), even if as happened here, the threat of prosecution results in an attorney's agreement to reimburse clients, (see RXs 16, 17 to hearing before Committee on Legal Ethics concerning respondent's pre-trial diversion).

It is difficult, of course, to predict the extent to which the court's holding will encourage noncompliance with the black lung fee requirements either in West Virginia or elsewhere. But based on past experience in the black lung program, it is likely that some lawyers will take advantage of the court's decision by entering into unsupervised fee arrangements. In its early years, the black lung system witnessed certain lawyers "soaking coal miners with fat fees for very little work" (see House Comm. on Education and Labor, 96th Cong., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, at 1 (Comm. Print 1979) (Statement of Rep. Heckler)), and the Department advises us that it continues to see attorneys entering into contingent fee agreements or other unapproved arrangements. See, *e.g.*, *Wells* v. *Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. 1-63 (Ben. Rev. Bd. 1986); *In re Shoemaker*, 11 Black Lung Rep. 3-145 (ALJ 1988); *Taylor* v. *Director, Office of Workers' Compensation Programs*, 11 Black Lung Rep. 3-184 (ALJ 1988).[12]

As a practical matter, while the decision below will not directly prohibit the Department from enforcing its fee

[12] The record in this case substantiates the prevalence of such conduct. Cf. Tr. 14 (statement by respondent's attorney at the hearing before the State Bar: "I think we all know that it's something that a lot of attorneys were doing, were taking their contingent fee contracts on these Black Lung cases"); Tr. 178 (testimony by Floyd Gibson, a former member of Committee on Legal Ethics, that there was a strong feeling, discussed regularly among attorneys, that the government did not have any business regulating black lung attorney's fees).

regulations, it threatens to expose black lung claimants to precisely the harms that Congress has sought to prevent. It is not for the courts to revise Congress's economic and social policies under the aegis of general constitutional guarantees, particularly on a factual record as frail as the one here. The policy choices in the black lung program reflect a careful balance of competing values, after examination by Congress and by the agency charged with administering the program. Courts should not use the Due Process Clause as the vehicle for redetermining federal policy with respect to the reasonable regulation of attorney's fees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
DAVID L. SHAPIRO
Deputy Solicitor General
MICHAEL R. DREEBEN
Assistant to the Solicitor General
WILLIAM KANTER
JOHN S. KOPPEL
Attorneys
Department of Justice

JERRY G. THORN
Acting Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
MARY-HELEN MAUTNER
Counsel for Appellate Litigation
EDWARD D. SIEGER
Attorney
Department of Labor

APRIL 1989

APPENDIX A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

v.

GEORGE R. TRIPLETT

[Filed Oct. 26, 1988]

Chief Justice McHugh and Justice Miller dissent and reserve the right to file a dissenting opinion.

Disciplinary Proceeding — Attorney Exonerated

NEELY, Justice:

This is a disciplinary proceeding brought by the Committee on Legal Ethics of the West Virginia State Bar (the "Committee") against George R. Triplett, a member of the Bar. The Committee has recommended a six month suspension of Mr. Triplett's license to practice law for his alleged violation of DR 1-102(A)(4), (5), and (6) of the West Virginia Code of Professional Responsibility which provide:

DR 1-102—Misconduct—(A) a lawyer shall not: (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (5) Engage in conduct that is prejudicial to the administration of justice; (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

The respondent failed to abide by regulations promulgated under the federal Black Lung Benefits Act, 30 U.S.C. 901, *et seq.*, for the collection of attorneys' fees in black lung cases.

The regulations at issue in this proceeding require that any attorney fee be approved by the Department of Labor; consensual arrangements between lawyers and clients for contingent fees are prohibited. Mr. Triplett asked his clients to execute contingent fee contracts allowing him 25 percent of accrued benefits. He did not seek Department of Labor approval for these arrangements and sought no fee whatsoever from the Department. When his clients prevailed, they paid Mr. Triplett, who put the money into bank accounts in his name as agent, trustee, or "attorney on escrow" for the individual clients.[1] The committee found the respondent guilty of professional misconduct reflecting on his fitness to practice law in violation of DR 1-102(A)(4), (5) and (6).

I

Introduction

Black lung cases are initiated when a miner files a claim with the Department of Labor (DOL). The claim is then

[1] Respondent testified that he heard discussion among the plaintiff's bar that the DOL regulations might be changed to allow contingent fees and, therefore, he put the money into escrow accounts awaiting that time. Record at 235, 257-8, 269. Respondent has returned all of the fee money, with interest, to his clients.

reviewed at the administrative level by a claims examiner or the deputy commissioner, and approved or denied after a medical examination by a DOL doctor. The claimant and defendant operator (if one can be identified) are then allowed to submit additional evidence and have the case reconsidered, again at the deputy commissioner level. Either side can then appeal the decision of the deputy commissioner to the Office of Administrative Law Judges (OALJ) and, from that decision, appeal to the Benefits Review Board (BRB). Appeal from a decision of the BRB lies in the U.S. Court of Appeals for the circuit in which the injury (last exposure) arose. 33 U.S.C. § 921(C). Benefits are awarded on a finding of total disability or death due to pneumoconiosis ("black lung"), and are payable by either the responsible operator (if one can be identified) or the Black Lung Disability Trust Fund. Who pays the claim depends on a number of factors including whether a responsible operator can be identified, when the claim was filed, and the date of last exposure.

Section 932 of the Black Lung Benefits Act (30 U.S.C. § 901 *et seq.*) incorporates several provisions of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901 *et seq.*) including 33 U.S.C. § 928 which provides that no one who represents a claimant shall be paid a fee unless it is approved by the deputy commissioner, the board or the court before whom the work is performed. Anyone who receives an unapproved fee is subject to a fine of $1,000 or imprisonment for not more than one year, or both.[2] If a defendant employer declines to pay compensation within thirty days of receiving written notice of the claim, and the claimant thereafter uses the services of a lawyer to win his claim, the deputy commissioner, the board or the court awards a reasonable attorney's fee to be

[2] 33 U.S.C. 928(c) and (e).

paid directly by the employer to the lawyer.[3] In cases where the claimant pays the attorney's fee, the DOL withholds part of the benefits when a claimant prevails until the lawyer files a fee petition that, when approved, is paid from the withheld funds.

Regulations promulgated under the Black Lung Benefits Act define the procedure and criteria for awarding attorneys' fees. 20 C.F.R. § 725.365 provides, in part:

> No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. . . .

20 C.F.R. § 725.366 provides in part:

> A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be supported by a complete statement of the extent and character of the necessary work done . . .

The criteria for determining fees are listed in 20 C.F.R. § 725.366(b).[4] Subsection (e) of 20 C.F.R. § 725.366 pro-

[3] 33 U.S.C. 928(a).

[4] The text of § 725.366(b) reads:

> Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take in to [sic] account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under Part B of Title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and Part 727 of this subchapter.

vides that a fee award by a deputy commissioner that is challenged may be reviewed by the Benefits Review Board. Because a fee is awarded only in the event a claimant is successful, lawyers are not paid at all in unsuccessful cases.

The Committee, in a Supplemental Memorandum, argues that any problems associated with black lung fee limitations are irrelevant because they did not charge Respondent with collecting an illegal fee under DR 2-106, but rather with ". . . *misrepresentation* to the Department of Labor regarding his intentions to collect a fee." Complainant's Supplemental Memorandum. However, this argument is not supported by the Committee's own *Full Hearing Panel Findings of Fact, Conclusions of Law and Recommendation Concerning Discipline.* In its *Conclusions of Law* at 6-7, the Committee lists the documentary evidence which establishes that Respondent knew DOL fee approval was required and, in several cases, that he authorized the DOL to release to the respective clients the portion of benefits retained to pay attorneys' fees. In these cases, Respondent also informed the DOL that he was not going to submit fee applications for their approval. The Committee says these documents

> . . . are all strong evidence of the knowledge of Respondent that the way to have a fee paid for his successful representation of his Black Lung clients was to file a petition for fees as provided by Section 725.365 of the Regulations. His failure to abide by the regu-

lation make [sic] him guilty of violation of DR 1-102 (A)(4), (5) and (6) . . .

It is evident, then, that the Committee found Respondent's misconduct to be his knowing violation of the DOL regulations, not his alleged misrepresentation to the DOL regarding his intentions to collect a fee. Moreover, had the Committee stated in its *Conclusions of Law* that Respondent lied to the DOL, such a finding would not have been supported by the record. The evidence establishes that Respondent communicated to DOL representatives that he would not submit fee applications to them in most of his cases. There is no evidence in the record that Respondent told the DOL he would not collect fees directly from his clients. In fact, the record suggests that the DOL, at least in one case, suspected the Respondent was collecting fees directly in violation of the regulations because they sent him an admonition against doing so.[5]

The gravamen of Respondent's alleged professional misconduct is not statements he made to the DOL, but his collection of fees in knowing violation of DOL regulations. The defendant argues in mitigation that the black lung attorneys' fees provisions, as they are applied, make it almost impossible for claimants to find competent counsel to represent them. Several lawyers who appeared on behalf of respondent testified about their own experience representing black lung claimants.[6] These lawyers were, at best, not paid adequately or promptly. Some were not

[5] *See* State Bar exhibit 3.

[6] Record at 196-198, testimony of William M. Miller stating that he has won three or four cases for claimants but has not been paid in any of them, including a case in which his client was awarded over thirty thousand dollars in back benefits in 1980; record at 206, testimony of James F. Cain stating that he no longer accepts black lung cases due to the difficulty of getting paid.

paid at all. This Court, then, perceived that if the allegations of respondent and his supporting witnesses that claimants cannot find counsel because of DOL fee limits were true, this case presented a significant constitutional issue. Accordingly, we invited interested parties to file additional briefs.

II

The Constitutional Issue

The question now before us is whether the federal limits on attorneys' fees in black lung cases violate the due process clause of the Fifth Amendment to the *Constitution of the United States* by effectively denying claimants necessary access to counsel. Answering this question raises both factual and legal issues: the mere denial to a claimant of counsel of his choice (or for that matter, any counsel) does not necessarily imply a denial of due process rights. Fortunately, the U.S. Supreme Court has set clear, bright line standards under which we can decide the legal issues of this case in *Walters v. National Ass'n. of Radiation Survivors*, 473 U.S. 305 (1985).

III

Due Process Analysis under *Walters*

In *Walters*, the U.S. Supreme Court upheld the constitutionality of a statute that limits to ten dollars the fee that may be paid a lawyer or agent who represents a veteran seeking benefits from the Veteran's Administration (VA).[7] In *Walters*, the plaintiff veterans argued that the fee limitation effectively precluded them from obtaining counsel and, therefore deprived them of property without due process of law. However, in answer to this asser-

[7] The fee limitation was first enacted in 1862 during the Civil War.

tion, the Supreme Court pointed out that due process is a flexible concept that requires a balancing of interests; thus, there is no *absolute* right either to a trial-like hearing or to representation by counsel in every proceeding that adjudicates a property right. More specifically, the Court applied the test set out in *Matthews v. Eldridge,* 424 U.S. 319 (1976):

> . . . which requires a court to consider the private interest that will be affected by the official action, the risk of an erroneous deprivation of such interest through the procedures used, the probable value of additional or substitute procedural safeguards, and the government's interest in adhering to the existing system . . . In applying this test we must keep in mind, in addition to the deference owed to Congress, the fact that the very nature of the due process inquiry indicates that the fundamental fairness of a particular procedure does not turn on the result obtained in any individual case; rather, "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." [citations omitted]

473 U.S. at 321. The Court went on to conclude that the government interest in the fee limitation in veterans' cases was to ensure:

> . . . that the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer. [citations omitted]

Id.

In *Walters,* the Court pointed out that destruction of the fee limitation in VA cases would result not only in claimants' paying over part of their benefits to lawyers, but would also complicate a process that Congress intended to keep uncomplicated and non-adversarial. The resulting transformation of the current VA system to a complicated, adversarial one would then virtually require claimants to hire lawyers to be successful. 473 U.S. at 323-324. The increased complexity, in turn, would require greater administrative costs, which would leave less money available for benefits. Accordingly, the Court reasoned, the government interest in the fee limitation was entitled to great weight. To prevail against such a reasonable congressional policy required an ". . . extraordinarily strong showing of probability of error under the present system – and the probability that the presence of attorneys would sharply diminish that possibility . . ." 473 U.S. at 326.

The Court frankly admitted in *Walters* that it was not possible to quantify exactly the danger of erroneous deprivation under the present system. However, the Court was quick to point out that only 16 percent of the cases that are appealed to the Board of Veterans Appeals (BVA) are reversed, which suggests a relatively low danger of erroneous deprivation if one assumes the BVA decision to be the "correct" result in every case. 473 U.S. at 327.

In *Walters,* the court made an important factual finding that lifting the fee limitation would not significantly reduce the danger of erroneous deprivation of veterans' benefits. For this finding the Court relied on statistics correlating the rate of ultimate success by claimants before the BVA by mode of representation. These statistics demonstrated that claimants who were represented by lawyers (*pro bono*) were only marginally more successful than *pro se* claimants or claimants represented by veterans'

organizations.[8] The Court noted that various veterans' service organizations supply high quality representation for any claimant who requests it regardless of a claimant's affiliation with a veterans' organization. 473 U.S. at 311-312. Congress had recently considered proposals to modify the fee limitation, and a Senate Committee report in 1982,[9] stated that body's concern

> "that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of non-attorney resources that has evolved in the absence of significant attorney involvement in VA claims matters."

473 U.S. at 322.

The Court in *Walters* specifically rejected the veterans' argument that the Veterans Administration's procedures are so complex, procedurally and factually, that they require lawyer representation of claimants. Although the Court conceded that cases of agent orange or radiation exposure might be considered "complex," these cases constituted, at most, two percent of appeals to the BVA. In conformance with the principle that the fundamental fairness of a procedure depends on the risk of error inherent in the truth-finding process as applied to the generality of cases rather than the rare exceptions, the Court was not persuaded that the VA process should be changed to accommodate the "rare exception" of "complex" cases. 473 U.S. at 328-330.

[8] The following statistics were taken from the record and relied upon by the Court. 473 U.S. at 327.

ULTIMATE SUCCESS RATES BEFORE THE BOARD OF VETERANS APPEALS BY MODE OF REPRESENTATION

American Legion	16.2%
American Red Cross	16.8%
Disabled American Veterans	16.6%
Veterans of Foreign Wars	16.7%
Other non-attorney	15.8%
No representation	15.2%
Attorney/Agent	18.3%

[9] The proposed bill allowed limited judicial review of BVA decisions and payment of attorneys' fees for representation in that review, but the bill was never enacted. 473 [U.S.] at 322, note 10.

Finally, the Court examined the nature of the property interest at issue. In *Goldberg v. Kelly,* 397 U.S. 254 (1970), the Court held that a welfare recipient subject to possible termination of benefits was entitled to a lawyer. In *Matthews v. Eldridge, supra,* the Court held that social security disability benefit recipients had no right to a pre-termination, trial-like hearing. The Court found that the benefits at stake in VA proceedings, which are not granted on the basis of need, are closer to the social security benefits in *Matthews* than they are to welfare payments ". . . upon which the recipients in *Goldberg* depended for their daily subsistence." 473 U.S. at 332-333.

IV

History of Black Lung Legislation

There currently exists in the State of West Virginia a large population of elderly, sick coal miners, their dependents and their survivors. Many have waited for extended periods for administrative review of their black lung claims. Others have had their claims denied, and have subsequently been unable to obtain counsel to review and prosecute their cases.

A high price is demanded of those who extract the life's blood of West Virginia's economy from the arteries in her mountains. As his lungs become clogged with insidious and pervasive dust, the miner is given a graphic projection

of the quality of life that lies ahead. The nature of the disease being progressive, the miner feels himself increasingly weakened and helpless, unable to provide even the most modest means of support for his family.

The full extent of the debilitating impact of long term exposure to coal dust was recognized with the passage of Title IV of the Federal Coal Mine and Safety Act of 1969.[10] This legislation was Congress' acknowledgement of the failure of state workers' compensation programs to address the devastating effects of black lung. The original legislation covered only underground miners and their wives or widows, and allowed recovery of benefits only in cases of total disability or death. The original legislation divided claims into Part B claims—those filed before 31 December 1972, to be administered by the Secretary of Health Education and Welfare (HEW), and Part C claims—those filed after 31 December 1972. Part C claims were to be administered by the Secretary of Labor under certain provisions of the Longshoreman's and Harbor Workers' Compensation Act of 1927.[11] Payment of Part C claims was to be made by the responsible operator, or if no responsible operator could be found, from federal revenues.

In 1972, Congress passed the Black Lung Benefits Act[12] which amended the earlier legislation. In addition to extending coverage to surface miners and changing some of the eligibility criteria, the 1972 Act postponed Department of Labor jurisdiction to claims filed after 31 December 1973, established a transitional category for claims filed between 1 July 1973 and 31 December 1973, and required coal companies to carry insurance or to qualify for self-

[10] Pub.L.No. 91-173, 83 Stat. 742 (1969).

[11] 33 U.S.C. § 901 *et seq.*

[12] Pub.L. No. 92-3-3 [*sic*], 86 Stat. 153 (1972).

insurance. The Act also allowed the Secretary of HEW to promulgate regulations to reopen all pending or denied claims and review them under the new legislation. The Secretary established a set of liberal "interim" regulations that caused a surge in Part B approvals. Part B claims were decided without any individual employer liability. *See* Lopatto, "The Federal Black Lung Program: A 1983 Primer" 85 *W.Va.L.Rev.* 677 at 686 (1983). The DOL encountered much difficulty in finding "responsible operators" to pay Part C claims due to the changing structure of the coal industry. In spite of considerable expense and effort by the government, responsible operators were being identified in only twenty-five to thirty percent of the cases. *Id.* at 689-690.

In response to the expense resulting from the surge in approvals without a corresponding increase of responsible operators to pay the claims, Congress passed the Black Lung Benefits Reform Act of 1977[13] and the Black Lung Benefits Revenue Act of 1977.[14] These amendments established the Black Lung Disability Trust Fund to be financed by an excise tax on each ton of surface or underground mined coal. In addition, the fund was made liable for all valid Part C claims in which the miner's last covered employment ended before 1 January 1970. These 1978 amendments also contained liberal eligibility criteria that resulted in a relatively high approval rate.

Almost immediately, the Trust Fund became insolvent. The 1978 amendments also directed that all previously denied and pending cases be reviewed under the new criteria. This new review created a large backlog of cases and systemic backlog has continued. Congress amended the legislation again in 1981, raising the excise tax and

[13] Pub. L. No. 95-239, 92 Stat. 95 (1978).

[14] Pub. L. No. 95-227, 92 Stat. 11 (1978).

restricting eligibility criteria in an effort to make the Trust Fund solvent. The 1981 amendment has resulted in a sharply reduced approval rate for claims. DOL statistics show that for the period January 1982, through March 1988, the number of initial claims filed was 58,680, and the number of final approvals (after appeals to an Administrative Law Judge and the BRB) was 3,383—a total approval rate of 5.8 percent.[15]

V

Black Lung Claims Process and Attorney Fee Provisions

Without considering the detailed eligibility criteria and regulations promulgated under each of the amendments discussed in part V, the history of black lung legislation demonstrates that even the *filing* of a claim for benefits is complex. It often requires a lawyer to determine which benefit structure applies to a particular claim. When responsible operators are represented by lawyers of their choice, at a fee set by whatever agreement they make (there is no regulation of defense attorneys' fees), and the trust fund is represented by the Office of the Solicitor in the DOL, a claimant who appears without a lawyer is in for a baffling and frustrating experience. Black lung litigation has none of the homey, claimant-oriented ambiance that one finds in the Veterans' Administration.

---

[15] *See* Brief of Amicus Curiae, Jane Moran, DOL statistics at 4, note 5. Also, a Government Accounting Office report confirms that the Office of Workers' Compensation which makes the initial determination of claims at the administrative level in the DOL approves only about 5% of claims made under the 1981 amendments. *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before the Employment and Housing Subcommittee of the House Committee on Government Operations,* 99th Cong., 1st Sess. at 55-56 (1985) (GAO Report HRD-85-19).

Furthermore, in black lung cases the legislation and regulations specifically contemplate representation by lawyers and, unlike the VA claim process in *Walters,* for payment of attorneys' fees. For Part B claims (filed before December 31, 1972), claimants are responsible for the attorneys' fees. For claims filed after December 31, 1973, either the responsible operator (if one can be identified) or the Trust Fund is liable for the attorneys' fees. But in either situation the fee must be approved under 20 C.F.R. §§ 725.365 and 755.366.

In our consideration of the constitutionality of the fee provisions, we must examine not only the words of the statute and regulations, but also the manner of their administration. In this regard we do not find that the statutory requirements assuring "reasonable" fees are unconstitutional on their face as a matter of principle; rather we find that the total regulatory scheme is unconstitutionally applied. As the U.S. Supreme Court stated in overturning a state compulsory work statute in *U.S. v. Reynolds,* 235 U.S. 133 (1914):

> If such state statutes, upon their face, *or in the manner of their administration,* have the effect to deny rights secured by the Federal Constitution or to nullify statutes passed in pursuance thereto, they must fail. [citations omitted, emphasis supplied]

235 U.S. at 149. In *Griffin v. Illinois,* 351 U.S. 12 (1956) the U.S. Supreme Court held unconstitutional a state law which, in effect, required a transcript to perfect a criminal appeal but did not provide a free transcript to indigents. The Court pointed out that:

> Dissenting opinions here argue that the Illinois Law should be upheld since by its terms it applies to rich and poor alike. But a law nondiscriminatory on its face may be grossly discriminatory in its operation.

351 U.S. at 17, note 11.

As we explained above, 20 C.F.R. § 725.366(a) provides that the claimant's lawyer should file a fee application with the deputy commissioner, the administrative law judge or the Benefits Review Board for the services performed before that individual or tribunal. The fee is then to be determined from the information provided in the application and in accordance with the criteria provided in 20 C.F.R. § 725.366(b). In addition, the Benefits Review Board has ruled that the contingent nature (i.e., risk of loss) of the litigation may be included as a criterion under the provision in part (b) that allows consideration of "any other information which may be relevant to the amount of fee requested." *Risden v. Director,* BRB No. 78-488, 11 BRBS 819 (1980).

Although 20 C.F.R. § 726.366(b) appears to provide for attorneys' fees that will fairly compensate competent counsel, thus guaranteeing claimants' due process rights, an examination of the factual record before us reveals that this is not the case. Numerous attorney affidavits filed in this case as well as testimony before the House of Representatives Subcommittee on Labor Standards establishes that the attorney fees policy of the DOL discourages lawyers from representing black lung claimants so that many claimants, with cases of at least arguable merit, are unable to find counsel to represent them.

VI

Actual Implementation of the DOL's Attorneys' Fee System

The DOL will not award any attorneys' fee until a "final" decision has been made in a case. *See* 33 U.S.C. § 928(a) and *Thompson v. Potashnick,* 812 F.2d 574 (9th Cir. 1987). Although a claimant may prevail before the Deputy Commissioner and Administrative Law Judge (assuming an appeal is taken at each stage) and his attorney files a fee petition that is approved at each stage, the fee will not be paid until after a final decision by the Benefits Review Board (BRB). If the BRB remands the case to the Administrative Law Judge, the attorney must wait even longer for his fee. The record reveals that lawyers wait for years, often five to ten years, before receiving any payment.[16] There is no provision in the law for payment of interest on attorneys' fees.[17] One affiant attorney states that he is currently owed more than $30,000 in fees that have been awarded but not paid. Brief of Amicus Curiae Jane Moran, affidavit of Robert F. Cohen, Jr. at 7. In a small, depressed West Virginia town $30,000 is a substantial amount of money for an individual practitioner. In the long run, as John Maynard Keynes once observed, we are all dead. In the short run, lawyers have offices to run, mortgages to pay and children to educate.

[16] A report by the Government Accounting Office, relying on DOL statistics, states that 78% of cases disposed of by the Office of Administrative Law Judges between October 1, 1983, and August 21, 1984 took more than two years to adjudicate. When time is added for the initial administrative determination as well as an appeal to the BRB, it is clear that it does, indeed, take years to resolve a claim. *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before the Employment and Housing Subcommittee of the House Committee on Government Operations,* 99th Cong., 1st Sess. at 41 (1985) (GAO Report HRD-85-19).

[17] Although the DOL seems cavalier about the fact that lawyers must wait for years to collect fees without also receiving interest on the fees, we note that the Internal Revenue Service is Rhadamanthine in its collection of interest when the U.S. government is a payee rather than a payor. In addition to any penalty that might be properly assessed, the IRS collects interest on any overdue or unpaid taxes, even if the taxpayer has been granted an extension of time in which to pay. *See* 26 U.S.C. § 6601, 26 CFR § 301.6601-1 *et seq.* We also note that a responsible operator must pay interest if it fails to pay benefits awarded either initially by the deputy commissioner, or on appeal. 30 U.S.C. § 934, 20 CFR § 725.608.

Another affiant attorney states that the DOL has an informal policy[18] of allowing a maximum hourly rate of $85.00 for proceedings before the Deputy Commissioner, and a maximum hourly rate of $125.00 for proceedings before the Office of Administrative Law Judges or BRB. *Id.*, affidavit of Frederick Muth at 3. This same affiant states that a typical case will average between two and eight years, depending on the length of appellate litigation, and that because of this factor and the low rate of compensation (in light of its contingent nature), fewer qualified attorneys are accepting black lung claims than are required to process existing meritorious claims. He also points out that ". . . it has become increasingly common to find instances of U.S. Department of Labor hearing dockets populated primarily with *pro se* claimants . . ." and that his law firm has been inundated with prospective clients who have been unsuccessful in their efforts to retain competent representation. *Id.* at 4.

Another affiant attorney, employed for five years by the United Mine Workers of America, who has handled black lung cases during all five years, and worked exclusively on black lung cases for two years, states that few attorneys are willing to represent black lung claimants due to the risk of no recovery (and, therefore, no fee). This affiant also points out that because a lawyer generally accepts the case before either parties' medical evidence is complete, the lawyer is usually unable to assess the merits of a black lung claim until after he agrees to represent the claimant. Furthermore, it is nearly impossible to handle a few cases on a *pro bono* basis because the complexity of black lung litigation requires a level of expertise that is consistent only

[18] The DOL does not have a formal policy establishing a maximum hourly rate. *Ashmore v. Director,* BRB No. 79-639, 3 BLR 1-374 (1981).

with a large number of cases due to the enormous investment of time necessary to learn the law and keep current with changes.[19]

In 1985, the House Subcommittee on Labor Standards[20] held several hearings in coal regions to study the problem of the systemic backlog of black lung cases. Two lawyers who testified before the Subcommittee in Wise, Virginia, who have been representing black lung claimants since the first law was enacted, provided ten specific examples where fees were approved, but no payment was received for at least two years, and in some cases, for five years or more.[21] Another lawyer testified that there are 26 cases in his office in which fees were awarded but not paid for more than three years.[22] Even if we assume that these examples are "exceptional" in some way, the very existence of "exceptional" cases in which lawyers are required to subsidize the operation of the federal government must have a chilling effect on lawyer willingness to enter the system.

Finally, one lawyer testified that many of his colleagues had ". . . stated unequivocally that they would not take black lung cases because of the delay in receiving the pay for their work as well as the possibility that they may receive no fee at all."[23] Virtually all of the lawyers who testified before this subcommittee stated that they rarely, if ever, took black lung cases due to the long delay before a

[19] *See* Appendix A.

[20] Subcommittee of the House Committee on Education and Labor.

[21] *Investigation of the Backlog in Black Lung cases: Hearings before the Subcomm. on Labor Relations of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. 82-83 and 88-89 (1985).

[22] *Id.* at 194.

[23] *Id.* at 188.

decision, the additional delay in having fees paid, and the uncompensated risk of receiving no payment, particularly in light of the significantly lower approval rate under the 1981 eligibility rules.

It is hardly surprising then, that most lawyers, at least most who have any choice, choose to handle cases that do not require a five year delay for fee payment. The two factors that currently keep most attorneys from accepting black lung cases are the long delay in payment, without any provision for interest, and the lack of premiums to offset the contingent nature of the work. This latter factor has become increasingly prominent as the approval rate has steadily declined following the enactment of the 1981 amendments. DOL statistics demonstrate an approval rate for claims decided under the 1981 law of 22.7% for claimants before the Administrative Law Judges, and an overall approval rate of 5.8%.[24] This approval rate is significantly smaller than that for VA claims,[25] and demonstrates not only the necessity of lawer representation, but the substantial risk that a lawyer will receive no fee at all for his work.

VII

Application of *Walters* Criteria to Black Lung Litigation

When the criteria set forth by the U.S. Supreme Court in *Walters* to assess the constitutionality of fee limitations are applied to black lung cases, it becomes apparent that the Fifth Amendment's due process clause requires that the provisions for awarding attorneys' fees in black lung cases must, in fact, allow claimants representation by competent counsel.

---

[24] *See supra,* note 15.

[25] Of 800,000 VA claims in 1978, more than 400,000 were allowed at the initial level and approximately 14,400 more were allowed after appeals. *Walters,* 473 U.S. at 309.

When the Court in *Walters* examined the nature of the government interest in limiting fees in veterans' cases, it found that the purpose of the limitation was to avoid lawyers' needlessly sharing claimants' benefits. The Court found that VA procedures are designed to be non-adversarial, and that if lawyers become involved on a large scale a more complicated and adversarial process will evolve without any improvement in terms of rates of error over the current system. However, in black lung litigation, it is clear that Congress intended that lawyers be used by claimants because it specifically provides for lawyers, and for payment of a "reasonable" attorney's fee. 33 U.S.C. § 928. And although the VA benefits process is relatively simple and non-adversarial, the black lung process is both complex and adversarial.[26]

The government interest in requiring approval of attorneys' fees in black lung cases is to ensure that neither the responsible operator nor the Trust Fund will be overcharged. The prohibition against direct agreement between a claimant and his lawyer is to protect claimants from improvident agreements that needlessly deplete their benefits. *See Moore v. Califano,* 471 F.Supp. 146 at 149 (1979). Unfortunately, the result of these regulations has been to make lawyers almost entirely unavailable to claimants. Indeed, although the ordinary claimant is not called upon to share his award with a lawyer, under the current system the claimant seldom has an award to share.

This turns our attention, then, to the second factor the Court analyzed in *Walters,* namely, the risk of erroneous deprivation of benefits under the existing VA procedure, and the probable value of additional or substitute safeguards. Relying on the statistics before it in *Walters* (*supra,* note 8), which demonstrated that claimants with

---

[26] See discussion, *supra,* at Sections IV and V.

lawyers are only marginally more successful in VA cases than claimants without lawyers, the Court found that allowing claimants free access to lawyers would not significantly increase the number of prevailing claimants. Factually, this is decidedly not the situation in black lung cases.

The black lung claims process is procedurally, factually and legally complex. Furthermore, at least in cases where a responsible operator is potentially liable for benefits, it is viciously adversarial.[27] Unfortunately, we do not have before us the kind of statistical evidence that the Court had in *Walters*. However, the Respondent's clients can probably be taken as representative of most claimants; they were all refused benefits before they retained Respondent who then won their cases.[28] Ironically, a responsible operator is free to retain lawyers to resist claims. Because benefits are expensive, operators often oppose claims vigorously.[29] In cases where the award will be paid by the

[27] Although the Office of Workers' Compensation in the Department of Labor (which is responsible for the initial decision of black lung claims) approves only about 5% of claims filed, responsible operators appeal more than 90% of these approvals to the Office of Administrative Law Judges. Of the 95% of the claims denied, applicants appeal about 40% to the OALJ. *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before the Employment and Housing Subcommittee of the House Committee on Government Operations,* 99th Cong., 1st Sess. at 55-56 (1985) (GAO Report HRD-85-19).

[28] Record at 34, 66-70, 82-83, 95, 111, 138-9, and 152.

[29] Brief of Amicus Curiae, Jane Moran, affidavit of Robert Cohen at 8-9, affidavit of Frederick Muth at 5-6. "The actuarial value of a 1982 claim by a living miner with a spouse is nearly $150,000 dollars." Lopatto, "The Federal Black Lung Program: A 1983 Primer," 85 *W.Va.L.Rev.* 677 (1983) at 686, citing actuarial chart in Black Lung Benefits Act Annual Report, U.S. Department of Labor 33 (Jan. 1981).

Trust Fund, the Fund is represented by lawyers from the DOL Office of the Solicitor. Finally, although the veterans' service organizations provide knowledgeable representatives to aid claimants for VA benefits, a fact that greatly impressed the Court in *Walters,* no such system of alternative representation exists to aid black lung claimants.[30] Therefore, lawyer representation is virtually essential to prevent erroneous deprivations of benefits for victims of black lung.

The third and final factor considered by the Court in *Walters* was the nature of the private interest at stake. The Court found that VA benefits are more akin to the social security benefits considered in *Matthews* than they are to the welfare benefits considered in *Goldberg.*[31] Because

[30] Although the United Mine Workers of America (UMWA) has provided substantial representation for claimants in the past, District 31 of the UMWA, one of three districts serving West Virginia, has ceased such representation due to lack of money. Brief of Amicus Curiae, Jane Moran, attached letter of January 26, 1987 from Eugene Claypole, John Darcus and James Slusser of UMWA.

[31] The District Court in the *Walters* case held that applicants for benefits, no less than persons already receiving them, have a "property" interest if the applicants meet the statutory criteria for benefits. The Supreme Court has thusfar held only that a recipient of benefits has a "property" interest in their continued receipt. Since at least one of the claimants in *Walters* alleged a diminution of benefits already being received, the Court did not decide whether a mere claimant has a "property" interest in his prospective benefits. 473 U.S. at 320, note 8. Respondent Triplett represented one claimant from whom the government sought repayment of an alleged overpayment of benefits. Record at 100-102. Because this client clearly had a vested property interest in these benefits, we need not rule on the nature of a claimant's property interest in prospective benefits, a question the Supreme Court has so far deferred. However, we here state our belief that a claimant who meets all the criteria making him eligible for benefits should not be deprived of due process safeguards simply because he is not already receiving benefits. Black lung benefits are not a form of government

black lung benefits are awarded only in cases of total disability or death,[32] they may well provide the only means of subsistence. This makes them similar to the welfare benefits ". . . upon which the recipients in *Goldberg* depended for their daily subsistence." *Walters,* 473 U.S. at 332-333.

Accordingly, we find that the DOL system of awarding attorneys' fees does, in fact, severely restrict claimants' ability to find competent lawyers to represent them, and, therefore, the system violates due process in accordance with the decision of the U.S. Supreme Court in *Walters*.

Alternatively, there is an independent basis for finding a violation of due process in a fee limitation scheme that effectively denies claimants the right to benefits granted by Congress. It is fundamentally unfair for the government to confer a right with one hand, and take it away with the other hand. As Chief Justice John Marshall said in *Marbury v. Madison,* 5 U.S. (1 Cranch) 49 (1803):

> "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is awarded." [quoting Blackstone] . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of

largesse, but rather are *compensation* for which the miner has paid dearly, either with total disability or death. If due process is truly a flexible concept, as the U.S. Supreme Court has repeatedly held, there can be no justification for an inflexible rule that claimants have no property interest in benefits for which they *qualify* but which they do not yet receive.

[32] The statute has one exception that allows payment of benefits to eligible survivors of a miner who dies before March 1, 1978, and who was employed at least 25 years in coal mines prior to June 30, 1971, unless it is established that when the miner died, he was not *partially* or totally disabled due to black lung. 30 U.S.C. § 921(c)(5) 1981.

> men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) at 58-59.

Congress has conferred upon qualified claimants the right to receive black lung benefits. Congress has also prescribed the remedy (the claims process) to guarantee this right, an essential part of which is the right to counsel. It is, therefore, unconstitutional for the Department of Labor by its regulations to deny qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits also granted by Congress.

VIII

The Risk of Loss Problem

There are several possible ways to award attorneys' fees that take into account the risk of loss factor in black lung cases. Most directly, the law could provide for a contingent fee based on a set percentage of any lump sum awarded, as the Respondent contracted for in this case. In the alternative, a multiplier could be used to enhance the "normal" hourly fee to compensate for the risk of loss. The U.S. Supreme Court has recently examined the use of "contingency multipliers" in the context of fee-shifting statutes.

In *Pennsylvania v. Delaware Valley Citizens Council,* 483 U.S. __, 107 S.Ct. 3078 (1987), the Court reversed a U.S. District Court's use of a contingency multiplier to enhance an award of attorneys' fees to successful plaintiffs under the fee-shifting provisions of the Clean Air Act (42 U.S.C.S. § 7604(d)). Justice White, writing for a plurality, said "The issue before us is whether, when a plaintiff prevails, its attorney should or may be awarded separate compensation for assuming the risk of not being paid." 483

U.S. __, 107 S.Ct. at 3081. Although Justice O'Connor joined the plurality to make a majority, she limited her concurrence to the circumstances of the particular case because she concluded that Congress" . . . did not intend to foreclose consideration of contingency in setting a reasonable fee under fee-shifting provisions such as the Clean Air Act . . ." *Id.* at 3089.

In addition to the mathematical difficulty of computing contingency multipliers, the Court pointed out that one of the strongest objections to them is that ". . . it penalizes the defendant with the strongest defense, and forces him to subsidize the plaintiff's attorney for bringing other unsuccessful actions against other defendants." *Id.* at 3085, citing Leubsdorf, "The Contingency Factor in Attorney Fee Awards," 90 *Yale L.J.* 473 at 488-491. The Court also noted that a contingency multiplier might encourage risky litigation because the less chance there is of prevailing, the higher the multiplier. *Id.* at 3086. However, Justice O'Connor, as well as the four dissenting Justices,[33] argued that this reasoning correctly suggests that awarding contingency enhancement based on the merits of a particular case may be undesirable, but the fact that it may be undesirable in a particular case does not, as a matter of principle, undercut the substantial justification for contingency enhancement in some types of cases. *Id.* at 3097 (Blackmun, J., dissenting).

The Court held that enhancement of a fee for the risk of loss in fee-shifting cases should be made only in exceptional cases when the risk of no recovery is clear from the outset of a case and when, without risk-enhancement, plaintiff ". . . would have faced substantial difficulties in finding counsel in the local or other relevant market." *Id.* at 3089. The Court concluded that these elements were not

[33] Justices Blackman, Brennan, Marshall and Stevens.

present in the case before it and held that the District Court's use of a multiplier in that case was improper.

The Court's decision in *Delaware Valley* does not preclude the use of a contingency multiplier in black lung cases. *Delaware Valley* applies to cases involving fee-shifting statutes that are different from the attorney fee provisions in black lung cases. Most importantly, fee-shifting statutes do not affect the ability of plaintiffs to enter into whatever contracts they desire with their lawyers and thus increase the lawyer's ultimate fee beyond the amount awarded under a fee-shifting statute. In black lung cases, however, no contract between a claimant and his lawyer is allowed, so lawyers are forced to accept the risk of receiving no fee at all in the large majority of cases.

Furthermore, in black lung cases, when either the claimant or the Trust Fund must pay attorneys' fees, there is no danger of losing defendants' compensating plaintiffs' lawyers for not prevailing against other defendants in other cases—the factor that so disturbed the Court in *Delaware Valley*. Also, it is clear from the evidence before us that the administration of the black lung attorneys' fee provisions has, in fact, caused claimants to face substantial difficulties in finding counsel willing to represent them, a factor specifically required by the Court in *Delaware Valley* for enhancement of fees in fee-shifting cases. *Id.*

IX

It is clear from the evidence before us that most lawyers are unwilling to represent black lung claimants because of the inadequate fees awarded by the DOL. On the one hand, it takes a matter of years to litigate a case, and often an additional two years after a successful conclusion for a lawyer to be paid his fee. When there is no provision for interest, and a lawyer faces overhead costs that cannot be postponed, any lawyer will turn his attention to paying

cases. In addition, because there is no systematic enhancement of fees to compensate lawyers for the risk of loss—a very substantial risk in cases decided under the 1981 law—most lawyers who have a choice will prefer contingent fee cases that provide premiums for risk.

We do not suggest what would be the best system for awarding attorneys' fees in black lung cases. That decision is properly left to Congress and the DOL promulgating regulations pursuant to congressional legislation within the bounds set by the *Constitution*. We do, however, find that the system as currently administered denies claimants for black lung benefits property without due process of law by severely restricting their right to obtain representation by competent counsel in the highly adversarial process of black lung litigation.

The respondent, George Triplett, was forced into making a tragic choice between conflicting duties. He either had to refuse to represent deserving, disabled miners, run the risk of bankrupting his practice, or violate the DOL regulations. The U.S. Supreme Court stated in *Ex Parte Siebold,* 100 U.S. 371 (1879) that:

> An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

100 U.S. at 376-377. *Accord, Norton* v. *Shelby County,* 118 U.S. 425 (1885); 16 Am.Jur.2d § 256.[34]

---

[34] Generally we do not believe it is sound practice to cite Am.Jur. because the treatise often states the majority and minority positions on a given issue with equal force. However, we deviate from our general rule here because with regard to the effect of unconstitutional laws, it appears that the weight of authority for the proposition quoted is so overwhelming that there is no minority position.

16 Am.Jur.2d § 256, in relevant part, reads:

Six black lung clients of Respondent testified at the ethics hearing before the Committee. One client was dissatisfied and said that he *never* agreed to pay Mr. Triplett anything for his work, although the client testified that the signature of his name on a 25 percent contingent fee contract did appear to be his. Record at 31. The Respondent testified that he explained the fee agreement fully to this client (and all of his other clients) before the client signed it. Record at 144. The other five clients testified that they agreed to pay Mr. Triplett 25 percent of any past benefits they were awarded, and that they were satisfied with Mr. Triplett's work and felt he deserved to be paid the 25 percent fee. The Respondent put the fee money he received into interest-bearing escrow accounts in the vain hope that the regulations would be changed to allow contingent fee agreements. We do not believe that this constitutes clear evidence of professional misconduct by Respondent.

> The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted. No repeal of such an enactment is necessary.
>
> Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. A contract which rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.
>
> No one is bound to obey an unconstitutional law and no courts are bound to enforce it. Persons convicted and fined under a statute subsequently held unconstitutional may recover the fines paid. [Footnotes omitted]

The Committee on Legal Ethics has the burden to prove by full, preponderating and clear evidence that Respondent is guilty of professional misconduct under DR 1-102(A)(4), (5) and (6) of the West Virginia *Code of Professional Responsibility*. Accordingly, we find the Respondent, George Triplett, not guilty of any ethical violation for resisting an administrative system that clearly and unambiguously violates the Fifth Amendment to the *Constitution of the United States.*

Because our decision involves an important question of federal law, we grant leave to the Department of Labor to intervene as a party litigant, either for the purpose of filing a petition for rehearing before this Court, or for the purpose of prosecuting an appeal to the Supreme Court of the United States.

Attorney Exonerated.

APPENDIX A

AFFIDAVIT SUPPLIED BY AMICUS, JANE MORAN

I, THOMAS H. ZERBE, being first duly sworn, states as follows:

I am an attorney employed with District 17, United Mine Workers of America in Charleston, West Virginia. I have been employed by District 17, U.M.W.A. for five (5) years. During all my five year tenure, I have either handled federal black lung claims or supervised attorneys who handled federal black lung claims. For two (2) years, my work was almost exclusively handling federal black [lung] claims. Currently, I am Director of Benefits, and as part of that job I supervise the black lung attorney as well as handle some claims myself.

I am familiar with virtually every attorney in West Virginia who represents clients in federal black [lung] cases. I have spoken personally with many of these attorneys about the economics of handling federal black lung cases. I have also spoken with clients and administrative law judges about the problem of claimants, who are not members of the United Mine Workers of America, in getting attorneys to represent them in federal black [lung] claims.

The number of attorneys willing to accept federal black lung claims has always been limited, but it has declined even more in recent years. Of those attorneys who do not accept federal black lung cases, many have a policy of accepting them only as a service to clients, whom they represent on other matters.

The reason attorneys are unwilling to represent claimant's in federal black lung claims is simple economics. The cases are difficult to win and the fee awards are too low considering the contingent nature of a fee. The federal statute prohibits the attorney from charging the client. If

the attorney wins the case, he submits a fee petition based on the number of hours that he has in the claim to the administrative law judge, who awards attorney's fees against the defendant. Most of the administrative law judges award an hourly rate that would be generous were it not a contingent fee, but it is still not enough considering the contingent nature of the fee and the very low win rate. The win rate for claimants before the Department of Labor administrative law judge[s] deciding claims filed after January 1, 1982, under the post-amendment law is only 22[.]7 percent.

Since the attorney generally accepts the case before either parties' [sic] medical evidence is fully developed, the attorney is often unable to evaluate the merits of the case at the time he accepts the client. This compounds the attorney's risk. It is impossible for attorneys to handle only a few cases *pro bono* because it is necesssary to handle a substantial number of cases in order to justify the time the attorney needs to invest to learn and keep current in this complex law.

By prohibiting attorneys from taking a percentage of the back award, the statute was designed to protect coal miners and their widows from gouging attorneys. Unfortunately, the effect has been to make lawyers unavailable to the miners and widows whom the law was designed to protect. The only way the system will work is to drastically increase the fee awards. [Signature and acknowledgements omitted]

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR

v.

GEORGE R. TRIPLETT

MILLER, Justice, dissenting:

We have traditionally stated that the scope of appellate review is confined to those issues decided at the trial level except where the lower court lacked jurisdiction to act in the first instance. This has coalesced into the language reflected in Syllabus Point 2 of *Duquesne Light Co.* v. *State Tax Dep't*, __ W. Va. __, 327 S.E.2d 683 (1984): " 'This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.' Syllabus Point 2, *Sands* v. *Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958)."

Here the question of the constitutionality of the black lung fee statute could have been raised below, but it was not. Because the issue was not raised below, there is no factual record developed. The ex parte affidavits filed as attachments to the amicus brief of Jane Moran are, to my mind, woefully inadequate to predicate the factual conclusion reached by the majority.

Furthermore, the majority's reliance on *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985), is completely misplaced. I find, contrary to the majority's statement, slip op. at 7, that *Walters* does *not* set "clear, bright line standards." What *Walters* did was to uphold the ten dollar fee statutorily authorized for a lawyer or agent who represented a veteran who was seeking veteran's benefits.

It did so chiefly because it began with this fundamental legal proposition:

> "Judging the constitutionality of an Act of Congress is properly considered ' "the gravest and most delicate duty that this Court is called upon to perform." ' *Rostker* v. *Goldberg,* 453 U.S. 57, 64 [69 L. Ed. 2d 478, 486, 101 S. Ct. 2646, 2651] (quoting *Blodgett* v. *Holden,* 275 U.S. 142, 148, 276 U.S. 594, 72 L. Ed. 206, 48 S. Ct. 105 (1927) (Holmes, J.)), and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government." 473 U.S. at 319, 87 L. Ed. 2d 232, 105 S. Ct. at 3188.

The Supreme Court's bottom line in *Walters* was that there was no factual showing that the fee system deprived veterans of due process under *Mathews* v. *Eldridge,* 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976):

> "We accordingly conclude that under the *Mathews* v. *Eldridge* analysis great weight must be accorded to the Government interest at stake here. The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities. *See Parham* v. *J.R.*, 422 U.S., at 608, n.16, 61 L. Ed. 2d 101, 99 S. Ct. 2493. It would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law. We have no hesitation in deciding that no such showing was made out on the record before the District Court." 473 U.S. at 326, 87 L. Ed. 2d at 236, 105 S. Ct. at 3192.[1]

In this case, I simply do not believe that such an "extradorinarily strong showing" has been made based on the generalized ex parte affidavits filed with this Court.[2] Here the main complaint by the several affiants is not so much the amount of the fee received, but the delay in receiving fees because of the backlog of black lung cases. I know of no court which has seized on this fact to void a fee system.

Finally, there appears to me to be a lamentable lack of due process extended to the Department of Labor, which now finds its attorney's fee mechanism declared un-

---

[1] *Mathews* v. *Eldridge,* 424 U.S. at 355, 47 L. Ed. 2d at 33, 96 S. Ct. at 903, formulated this set of factors to determine the appropriate due process requirements:

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, or additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

[2] In *Walters,* the Supreme Court was confronted with similar generalized assertions about the unfairness of the administrative procedures in the Veteran's Administration and made this telling comment:

> "Anecdotal evidence such as this may well be sufficient to support a finding by a judge or jury in litigation between private parties that a particular fact did or did not exist. But when we deal with a massive benefits program provided by Congress in which 800,000 claims per year are decided by 58 regional offices, and 36,000 claims are appealed to the BVA, it is simply not the sort of evidence that will permit a conclusion that the entire system is operated contrary to its governing regulations." 473 U.S. at 324 n.11, 87 L. Ed. 2d at 235 n.11, 105 S. Ct. 3191 n.11.

constitutional without ever having the opportunity to be heard before this Court announced its decision.

I am authorized to state that Justice McHugh joins me in this dissent.

APPENDIX B

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR

v.

GEORGE R. TRIPLETT

[Filed Dec. 20, 1988]

NEELY, Justice:

On a former day, to-wit the 14th day of December 1988, came the United States Department of Labor by its Solicitor of Labor, George R. Salem, Esq., and pursuant to leave heretofore granted, intervened to petition the court to grant a rehearing in this matter. Intervenor, the United States Department of Labor, also petitioned to supplement the record by the inclusion of the following: Affidavit of James L. De Marce, Associate Director, Division of Coal Mine Workers' Compensation; Affidavit of Jane G. Denney; Affidavit of Nahum Litt; Department of Labor Letters CM-1000a and CM-1000b; and the awards and/or decisions in the cases of Charles Ice, Raymond Corley, Thelma Beam, Jacob B. Godwin, Peter Guire, Anna J. Poling, Euna Ball, Harry Hedrick, William F. Scott, and Inobelle Stevenson. All of the aforesaid

material is hereby ordered filed and made a part of the record in this case for all purposes.

The court has carefully considered the supplemental material filed by the Department of Labor in support of its petition for rehearing, and has also carefully considered the factual representations and legal arguments set forth in intervenor's brief in support of its petition for rehearing. The court concludes that the arguments advanced by the Department of Labor were maturely considered upon the initial submission of this case and are adequately addressed in the court's original opinion.

Intervenor seeks to overcome the court's conclusion that lawyers are paid inadequately and too slowly under the current Department of Labor fee limitation system through the following representation:

> "Nor is it reasonable to conclude from the record that respondent would have experienced inordinate delays in having his fee petitions approved. In the one instance where he submitted a fee petition after obtaining a Trust Fund award at the deputy commissioner level, he received payment, at the requested rate and for more hours than he documented (but less than he requested), approximately eight months after his application. . . In the one instance where he applied to an ALJ for a fee award in a responsible operator case, he received an award, despite the operator's objections, within 11 months of the date of his application, and within 7 months of the ALJ's receipt of it."

Intervenor's Brief at p. 7. We find that an eight month and eleven month delay in fee payments simply support the findings of fact and conclusions of law set forth in the court's original opinion.

Intervenor defends the constitutionality of the fee system as applied by arguing that a different system would

be more expensive *both* in terms of the cost of lawyers' fees and in terms of the added burden on the system of affording claimants a fair opportunity to be heard. In this regard intervenor asserts:

> "Another legitimate government interest is to ensure that responsible operators and the Trust Fund will not be overcharged. The Court recognized (slip op. 23) but gave very little weight to this interest. This interest is substantial because of operators' constitutional rights (*Levins*, 724 F.2d at 9) and because the Trust Fund, which is financed by the coal industry (26 U.S.C. (& Supp. IV) 4121(a), 9501), is currently almost $3 billion in debt to the United States Treasury. See Affidavit of James L. De Marce, *supra*. Higher attorney's fees could increase this debt, as could the expense of more prolonged claims processing from attorney participation in cases (cf. *Walters*, 473 U.S. at 324-326), the latter by requiring the hiring of more personnel at the ALJ and Benefits Review Board levels to prevent a rebuilding of a case backlog. . . Such increased costs to the Fund; and thereby to the government in the form of increased debt, must be given serious consideration, as the Court admonished in *Mathews*, 424 U.S. at 348, even though they are not controlling. At some point, the costs to government and the public (including the resulting need to cut limited resources elsewhere) outweigh the benefit to the individual of the additional safeguard."

Intervenor's brief at pp. 16, 17. We infer that the Solicitor is arguing that the current fee limitation system, which discourages adequate representation, is justified on the grounds that if claimants had access to lawyers, claimants would prevail more often and raise the costs of the black

lung program. We do not find that Congress's purpose in authorizing limitations on fees was to reduce the number of eligible claimants who would prevail and receive benefits.

Intervenor makes explicit reference to statistics compiled specially for its rehearing petition in this case. The Department of Labor's own specially compiled statistics (the Solicitor's best shot) conclusively demonstrate that at the administrative law judge level, claimants represented by counsel have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*. In this regard the Solicitor says:

> "Statistics compiled by the Department in a sample of recent cases resulting in awards or denials of benefits show that claimants are represented at the ALJ level in 92% of the cases, and prevail 29% of the time when represented. While the statistics also show that the small minority of *pro se* claimants have an 11.6% success rate, this difference certainly is not so significant as to establish that lawyers are indispensable in the BLBA claims process—particularly in light of the 92% representation rate."

Intervenor's brief at p. 23. We find that the Solicitor has simply reinforced with more elaborate statistics the conclusion that we reached in the original opinion—namely, that a claimant's chance of prevailing when he is represented by counsel is substantially higher than when he appears *pro se*.

When claimants represented by counsel prevail 2.5 times as frequently [as] *pro se* claimants, we cannot agree with the Solicitor that the difference is not constitutionally significant for due process purposes. The Solicitor argues that:

> "Assuming, without conceding, that applicants have a property interest under the due process clause, their interest is only the intangible interest in receiving fair consideration of their applications. They risk losing only a chance at benefits rather than the benefits themselves."

Intervenor's brief at p. 19. However, we stand by our original conclusions: We believe that "receiving fair consideration" is exactly the type of abstract entitlement that due process principles are designed to protect and enchance.

Finally, we have carefully considered the following argument of the Solicitor:

> "Moreover, as in *Walters*, 473 U.S. at 326, there is also a risk that increased attorney representation may exacerbate the adversarial nature of the black lung adjudicatory system, resulting in an [sic] increased administrative costs to the government and delay to deserving claimants."

Intervenor's brief at p. 23. Because responsible operators may be as adversarial as they wish in the defense of claims, and may spend as much money as they choose on lawyers' fees, we have a hard time understanding how claimant representation by lawyers is liable to "exacerbate the adversarial nature of the black lung adjudicatory system. . . ." Although we know the irony is unintentional, we cannot help but infer that the Solicitor is arguing that if claimants have full and fair access to lawyers, they might do reprehensibly adversarial things such as introduce competent evidence, study the claims regulations, vigorously prosecute cases, and perhaps even appeal to the courts.

Accordingly, it is Adjudged, Ordered and Decreed that Intervenor's petition for rehearing be, and the same hereby is denied. And it is further Ordered that this Order be printed as an addendum to the original opinion.

APPENDIX C

BEFORE THE COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR

I.D. #86-056

IN RE: GEORGE R. TRIPLETT, A MEMBER OF
THE WEST VIRGINIA STATE BAR

FULL HEARING PANEL FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION CONCERNING DISCIPLINE

This matter came on for deliberation by the Full Hearing Panel of the Committee on Legal Ethics of The West Virginia State Bar at its meeting held on March 26, 1988, in Charleston, West Virginia. After review of the Subcommittee Report submitted by the Hearing Subcommittee which had been assigned to the hearing of the matter, the Hearing Panel entered upon deliberations of the matter and, after consideration of the record in the Subcommittee Report, voted unanimously, a quorum being present, to make the following Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline:

FINDINGS OF FACT

The Hearing Panel has carefully reviewed the outline of evidence presented by the Hearing Subcommittee as found on pages 2 through 5 of the Hearing Subcommittee Report signed by the members of the Hearing Subcommittee.

After review of the evidence and discussion of the matter, the Full Hearing Panel further determined that the three Findings of Fact (with all subparagraphs of paragraph three) with regard to the allegations against Attorney George R. Triplett in I.D. 86-056 as set forth on pages 2 through 5 of the Hearing Subcommittee Report are supported by full and clear preponderance of the evidence and are adopted as Findings of Fact by the Full Hearing Panel of the Committee on Legal Ethics.

CONCLUSIONS OF LAW

After due consideration of the foregoing Findings of Fact, the Full Hearing Panel of the Committee on Legal Ethics determined that the Conclusions of Law listed on pages 6 and 7 of the Hearing Subcommittee Report were appropriate in this matter and voted to adopt the Conclusions of Law recited in the Hearing Subcommittee Report as those of the Full Hearing Panel of the Committee on Legal Ethics.

RECOMMENDATION OF DISCIPLINE

After due deliberation of the Findings of Fact, the Conclusions of Law and the Recommendation of Discipline, as contained on page 7 of the Hearing Subcommittee Report, the Full Hearing Panel determined that it will present a formal recommendation to the Supreme Court of Appeals of the State of West Virginia that Respondent George R. Triplett be suspended from the practice of law for a period of six months by the Supreme Court of Ap-

peals and that he be required to pay the costs incident to the investigation and prosecution of this matter.

HEARING PANEL, COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

ARTHUR M. RECHT

Arthur M. Recht, Chairman

DATE: April 3 1988

BEFORE THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

I.D. #86-056

IN RE: GEORGE R. TRIPLETT, A MEMBER OF THE WEST VIRGINIA STATE BAR

SUBCOMMITTEE REPORT

The matter is before a Hearing Subcommittee upon a statement of charges filed by the Committee on Legal Ethics of the West Virginia State Bar against George R. Triplett, (herein "Respondent").

The hearing upon the Statement of Charges was conducted on August 3, 1987, before a Subcommittee composed of John C. Skinner, Jr., Chairman, David Harris and Warren A. Thornhill, III.

The written notice containing a plain statement of the charges against the Respondent was served and executed in accordance with Article 6, Sections 4 and 39 of the West Virginia State Bar By-Laws.

The following constitutes the Subcommittee Report containing a State[ment] of the Findings of Facts, Conclusions of Law and Recommendation as to the warranted disciplinary procedure in accordance with Article 6, Section 17 of the West Virginia State Bar By-Laws.

FINDINGS OF FACT

(1) Respondent is a licensed member of the West Virginia State Bar.

(2) The venue of these proceedings was held in Randolph County where Respondent has his principal office in accordance with Article 6, Section 14 of the West Virginia State Bar By-Laws and there was no challenge to the composition of the Subcommittee.

(3) That both direct and circumstantial evidence in this case establishes by full, preponderating, clear and convincing evidence that:

(a) Beginning in approximately 1978, Respondent represented various clients with respect to their claims for compensation under the Black Lung Benefits Act, 30 U.S.C. Sec. 901, et seq.

(b) On February 18, 1980, Respondent wrote to Harry L. Gayer, Deputy Commissioner of the U.S. Department of Labor, requesting that payment of an award to his client, Andrew M. DeMotto, be made directly to the client and stated that Respondent would not file a Form CM-972 for attorneys' fees from the Department of Labor. Mr. Gayer responded, in a letter dated April 8, 1980, that the Department of Labor would reimburse Mr. DeMotto in the amount previously withheld for attorneys' fees with the understanding by all parties that any fee paid in the case must first be approved by the Department in accordance with Section 725.365 of the regulations. On April 15, 1980, Respondent submitted a Form CM-972 (Petition for attorney fees) for payment of 42 hours expended at a rate of $60.00 per hour for a total of $2,250.00. However, the itemized list of time expended actually totaled twenty-two hours. On January 21, 1981, the acting Deputy Commissioner approved a fee award of $1,620.00, which represented 27 hours of legal services at the rate of $60.00 per hour. The amended award of benefits disallowed 15 additional hours because those hours were not reflected on the fee application form. Respondent received from Mr. DeMotto not less than $2,535.00 in legal fees for representation in the Black Lung Benefits case.

(c) On June 13, 1979, Respondent filed an application for approval of a representative's fee with the United States Department of Labor on behalf of his client, Charles G. Hillyard, which stated "No Applications for fee." Respondent certified that the information provided on the application was true and correct to the best of his knowledge and belief. On August 16, 1979, Respondent wrote to Ms. Luckie Kee, a claims examiner for the United States Department of Labor, that he did not plan to submit a fee application for his representation of Mrs. Thelma Beam. *On September 3, 1980, Respondent wrote to Dennis Allard, a claims examiner for the U.S. Department of Labor, that he would not submit a claim for legal fees on behalf of Letha Roberts.* On September 3, 1980, Respondent wrote to Mr. Edith Taylor, a claims examiner for the U.S. Department of Labor, that he would not submit a claim for legal services on behalf of Cosimo Vallelonga. On December 10, 1980, Respondent wrote to Ms. Taylor again, requesting that the $700.00 which the Department of Labor was withholding from Mr. Vallelonga's benefit award for attorney's fees be promptly paid to Mr. Vallelonga because Respondent would not be submitting a claim for legal services.

(d) Without making any application for fees as required by 20 C.F.R. Section 725.365 and 725.366 and 33 U.S.C. Section 928(e), Respondent requested and received fees for representation in Black Lung Benefit cases in the approximate amounts listed below from the following clients:

1. Charles Hillyard	$ 2,556.00
2. Thelma Beam	$ 3,571.18
3. Letha Roberts	$ 2,499.50
4. Cosimo Vallelonga	$ 6,300.00
5. Mary Bertelli	$ 995.41
6. Julie D. Rossi	$ 1,433.00
7. Anna J. Poling	$ 5,400.00
8. Peter G. Guire	$ 6,564.30

9. Jacob B. Godwin	$13,533.50
10. Charles Ice	$ 5,958.00
11. Raymond Corely	$ 3,500.00
12. William Scott	$ 2,000.00
13. Euna Ball	$ 2,100.00
14. Inobell Stevenson	$ 2,451.00
15. Harry Hedrick	$ 2,367.50

(e) On September 19, 1986, Respondent signed an Agreement for Pre-Trial Diversion which deferred prosecution by the United States Attorney for the Northern District of West Virginia for alleged offenses in violation of 18 U.S.C. Section 1341 and 1505 upon certain conditions, including complete restitution with interest for all legal fees collected in the amounts listed in paragraphs (b) and (d) set forth above and an agreement by Respondent not to represent persons in the prosecution in [sic] the Black Lung Benefit claims. Respondent has made such restitution.

(f) The Respondent has been the Circuit Judge of Randolph County, West Virginia, and had approved the payment of fees to attorneys for services provided for indigents charged with crimes which forms required itemized statements for the time spent both in and out of court. The Respondent as Circuit Judge had approved infants' settlements of personal injury claims which allow attorney fees.

As early as February of 1978 Respondent had drafted a fee petition in Mary Bertelli's case.

(g) The amounts taken in fees described in (d) above equaled approximately 25% of the lump sum award. Most of the recipients had executed a contingent fee contract with Respondent providing for Respondent to receive 25% of the recovery although none of the contracts admitted into evidence was executed by the Respondent.

(h) The various clients enumerated in (d) paid the Respondent the sums set forth and Respondent put the sums in bank accounts in his name as agent or trustee or attorney on escrow for the individual claimants. In 1983, the Respondent spent some of the escrowed funds for his own use.

(i) The Respondent made full restitution to all of his Black Lung clients for all fees charged plus interest at the going rate. Respondent cooperated fully with the Federal authorities and cooperated fully with the State Bar. Respondent enjoys a good reputation and has not been previously charged with an ethics violation.

(j) The Respondent appears to enjoys a good reputation among his clients and in the community as being a hard worker and having good character.

CONCLUSIONS OF LAW

The Respondent had filed fee petitions very early in his representation of Black Lung claimants. The fact that he thought it necessary to escrow the 25% contingent fees he charged Black Lung claimants manifests a clear awareness on his part that the failure to secure fee approval was wrong. The vague references to the possibility that the law might be changed to legitimatize what he had done does not stand up in the cold light of day. The designation by Jacob B. Godwin of Respondent (S2), the letter from Respondent to Mr. Gayer (S3) that he would not file a petition for attorney fees for DeMotto, the response to Respondent from Mr. Gayer (S3) ". . . that any fee to be paid in this case must first be approved by the Department of Labor in accordance with Section 725.365 of the regulations.", the January 21, 1981, letter from the Labor Department to Mr. DeMotte [sic] with a copy to Respondent allowing a fee of $1,620.00 and prov[id]e that "Pay-

ment of any amount greater or lesser than that approved shall be invalid.", the August 16, 1979, letter from Respondent to Luckie Kee (S4) that he did not plan to submit a fee application in Thelma Beam's claim, the award for Cosimo Valleglonga (S5), the December 10, 1980, letter from Respondent to Edith Taylor that no fee petition would be made for Vallelonga, the application for fees for Charles H. Hillyard (S6) as well as the Award of Benefits, Award of Benefits for Paul Roberts (S8), the Award of Benefits for Julie Rossi (S9), the Award of Benefits for Mary Bertelli (S10) are all strong evidence of the knowledge of Respondent that the way to have a fee paid for his successful representation of his Black Lung clients was to file a petition for fees as provided by Section 725.365 of the Regulations. His failure to abide by the regulation make[s] him guilty of violation of DR 1-102(A)(4), (5) and (6) of the Code of Professional Responsibility which provide that a lawyer should not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5) Engage in conduct that is prejudicial to the administration of justice.
(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

The Subcommittee concludes that Respondent is guilty of violations charged but that the cooperation of the Respondent, his good character and reputation together with his previously unblemished record are mitigating factors.

RECOMMENDATION

The Subcommittee recommends that Respondent should be suspended from the practice of law for a period

of six (6) months and that he should be required to pay the costs of this matter.

Dated this 24[th] day of March, 1988.

JOHN C. SKINNER, JR.
John C. Skinner, Jr.

DAVID HARRIS
David Harris

WARREN A. THORNHILL, III
Warren A. Thornhill, III

APPENDIX D

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 18396

COMMITTEE ON LEGAL ETHICS OF
THE WEST VIRGINIA STATE BAR, COMPLAINANT

v.

GEORGE R. TRIPLETT A MEMBER OF THE WEST
VIRGINIA STATE BAR, RESPONDENT

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of December, 1988, the following order was made and entered:

The Court having maturely considered the petition for rehearing and reargument filed in the above-captioned case is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: ANCEL G. RAMEY
Clerk, Supreme Court of Appeals

APPENDIX E

Black Lung Benefits Act, 30 U.S.C. 932

§ 932. Failure to meet workmen's compensation requirements

(a) Benefits; applicability of Longshore and Harbor Workers' Compensation Act; promulgation of regulations

Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C. 901 et seq.], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C. 901, 902, 903, 904, 908, 909, 910, 912, 913, 929, 930, 931, 932, 933, 937, 938, 941, 943, 944, 945, 946, 947, 948, 948a, 949, 950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled

thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928

§ 928. Fees for services

(a) Attorney's fee; successful prosecution of claim

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of this chapter and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney f the claimant in a lump sum after the compensation ord becomes final.

(b) Attorney's fee; successful prosecution for additional compensation; independent medical evaluation of disability controversy; restriction of other assessments

If the employer or carrier pays or tenders payment of compensation without an award pursuant to section 914(a) and (b) of this title, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the deputy commissioner or Board shall set the matter for an informal conference and following such conference the deputy commissioner or Board shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to

accept such written recommendation, within fourteen days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation, and thereafter utilizes the services of an attorney at law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Secretary, as authorized in section 907(e) of this title and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Board or court in any such case an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accord with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.

(c) Approval; payment; lien

In all cases fees for attorneys representing the claimant shall be approved in the manner herein provided. If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant. An approved at-

torney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award; and the deputy commissioner, Board, or court shall fix in the award approving the fee, such lien and manner of payment.

(d) Costs; witnesses' fees and mileage; prohibition against diminution of compensation to claimant

In cases where an attorney's fee is awarded against an employer or carrier there may be further assessed against such employer or carrier as costs, fees and mileage for necessary witnesses attending the hearing at the instance of claimant. Both the necessity for the witness and the reasonableness of the fees of expert witnesses must be approved by the hearing officer, the Board, or the court, as the case may be. The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this chapter.

(e) Unapproved fees; solicitation; penalty

Any person who receives any fees, other consideration, or any gratuity on account of services rendered as a representative of a claimant, unless such consideration or gratuity is approved by the deputy commissioner, Board, or court, or who makes it a business to solicit employment for a lawyer, or for himself in respect of any claim or award for compensation, shall upon conviction thereof, for each offense be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

Department of Labor regulations: 20 C.F.R. 725.365-725.367

§ 725.365 Approval of representative's fees; lien against benefits.

No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. In cases where the obligation to pay the attorney's fee is upon the claimant, the amount of the fee awarded may be made a lien upon the benefits due under an award and the adjudication officer shall fix, in the award approving the fee, such lien and the manner of payment of the fee. Any representative who is not an attorney may be awarded a fee for services under this subpart, except that no lien may be imposed with respect to such representative's fee.

§ 725.366 Fees for representatives.

(a) A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be filed and served upon the claimant and all other parties within the time limits allowed by the deputy commissioner, administrative law judge, or appropriate appellate tribunal. The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of a represen-

tative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

(b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973, under Part B of Title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and Part 727 of this subchapter.

(c) In awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case. Reimbursement for travel expenses incurred by an attorney shall be determined in accordance with the provisions of § 725.459(a). No reimbursement shall be permitted for expenses incurred in obtaining medical or other evidence which has previously been submitted to the Office in connection with the claim.

(d) Upon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued. Any party may request reconsideration of a fee awarded by the adjudication officer. A revised or modified fee award may then be issued, if appropriate.

(e) Each request for reconsideration or review of a fee award shall be in writing and shall contain supporting statements or information pertinent to any increase or decrease requested. If a fee awarded by a deputy commissioner is disputed, such award shall be appealable directly to the Benefits Review Board. In such a fee dispute case, the record before the Board shall consist of the order of the deputy commissioner awarding or denying the fee, the application for a fee, any written statement in opposition to the fee and the documentary evidence contained in the file which verifies or refutes any item claimed in the fee application.

§ 725.367 Payment of a claimant's attorney's fee by responsible operator.

(a) If an operator declines to pay any benefits on or before the 30th day after receiving written notice of its liability for a claim on the ground that there is no liability for benefits within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney in the successful prosecution of the claim, there shall be awarded, in addition to the award of benefits, in an order, a reasonable attorney's fee against the operator or carrier in an amount approved by the deputy commissioner, administrative law judge, Board, or court as the case may be, which shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final.

(b) Section 205(a) of the Black Lung Benefits Amendments of 1981, Pub. L. 97-119, amended section 422 of the Act and relieved operators and carriers from liability for the payment of benefits on certain claims. Payment of benefits on those claims was made the responsibility of the

Trust Fund. The claims subject to this transfer of liability are described in § 725.496 of this part. On claims subject to the transfer of liability described above the Trust Fund will pay all fees and costs which have been or will be awarded to claimant's attorneys which were or would have become the liability of an operator or carrier but for the enactment of the 1981 Amendments and which have not already been paid by such operator or carrier. Section 9501(d)(7) of the Internal Revenue Code, which was also enacted as a part of the 1981 Amendments to the Act, expressly prohibits the Trust Fund from reimbursing an operator or carrier for any attorney fees or costs which it has paid on cases subject to the transfer of liability provisions.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/00199